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THE

AMERICAN LAW REGISTER.

MAY 1874.

THE LAWS OF WAR. THE CONSTITUTION AND THE WAR POWER. THE LIABILITY OF THE GOVERNMENT TO PAY WAR CLAIMS.

THE period which covers the time of the rebellion, and since, has been eventful in our judicial and constitutional history. New questions have arisen of great importance requiring solution by diplomacy, by Congress, and the courts; questions of municipal, military, constitutional and international law.

Among these are some classes which relate to *the liability of the Government upon prineiples of international law, to pay demands arising in various forms by the operations of war.*

Some questions have arisen out of all the wars in which the United States have been engaged, but they were few and unimportant when compared with those growing out of the recent rebellion. These are now attracting the attention of jurists and statesmen, in a form which renders a brief discussion of some classes of them appropriate. The views which follow are therefore submitted for thoughtful consideration.

CHAPTER I.

OF WAR—REBELLION—THE CLASSES OF WAR CLAIMS—GENERAL PRINCIPLES.

DURING the wars in which the United States have been engaged, many claims[1] have been from time to time made against the Gov-

[1] For claims see American State Papers, class IX., vol. 1, "Claims."
House list of private claims, vols. 1, 2 and 3, from 1st to 31st Congress, entitled "Digested Summary and Alphabetical List of Private Claims," &c. House

ernment, by citizens, corporations under national, or state, or foreign authority, and by aliens.[2]

It is now determined, by the highest court, that the recent civil war *began*, at least for some purposes and at some localities, as early as April 1861.[3] By the President's proclamations of April 15th and 19th 1861, an insurrection was declared to exist in certain states. Under, and it may be correct to say by virtue of, the Act of Congress of July 13th 1861, the proclamation of in-

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Mis. Doc. 109, 42d Cong. 3d sess., digested summary private claims, presented to House of Reps. from 32d to 41st Congress inclusive. See an article on "Government claims," 1 American (Boston) Law Review 653 (July 1867).

[2] Claims of aliens have frequently been made the subject of diplomatic arrangements. See report of Hon. R. S. Hale, November 30th 1873, to Secretary of State, of proceedings of commission under 12th article treaty of 8th May 1871, between United States and Great Britain.

See "opinions of heads of executive departments and other papers relating to expatriation, naturalization, and change of allegiance" in House Ex. Doc. 1, part 1, 1st sess. 43d Congress, Report of Secretary of State on Foreign Relations, p. 1177, part 1, vol. 2.

The Act of July 27th 1868 (15 Stat. 243, sec. 2) gave aliens a right to sue in the Court of Claims, when the government of such aliens gave a similar right to our citizens

In *Fichera* v. *U. S.*, 9 Court Claims R., decided in 1873, it is shown that aliens have a right to sue the Government by the modern codes in Prussia, Italy, Hanover and Bavaria, (*Brown's Case*, 5 C. Cls. R. 571;) in the republic of Switzerland, (*Lobsiger's Case*, Id. 687;) in Holland, the Netherlands, the Hanseatic Provinces, and the Free City of Hamburg, (*Brown's Case*, 6 C. Cls. R. 193;) in France, (*Dauphin's Case*, Id. 221;) in Spain, (*Molina's Case*, Id. 269;) and in Belgium, (*De Give's Case*, 7 C. Cls. R. 517.)

In England aliens have a remedy by "petition of right," regulated by Act 23 and 24 Victoria, July 3d 1860. *U. S.* v. *O'Keefe*, 11 Wallace 179; *Carlisle* v. *U. S.*, 16 Wallace 148. See Whiting's War Powers of the President 51; *The Venus*, 8 Cranch; *The Hoop*, 1 Robinson 196; *The Amy Warwick*, 2 Sprague.

See Whiting's "War Claims," affixed to "War Powers," p. 333, ed. of 1871; *Perrin* v. *U. S.*, 4 Court Claims 547.

For the acts relating to debts due by or to the United States, see Brightly's Digest.

[3] *The Prize Cases*, 2 Black 636. (12 Stat. 257.) See proclamations of April 15th, April 19th, and April 27th 1861, 12 Stat. pp. 1258–1260; Lawrence's Wheaton, second annotated ed., sup. 44; proclamation of July 1st 1862; Act June 7th 1862. The treaty of Washington fixes the commencement April 13th 1861. (17 Stat. p. 867, § 12.) See the diplomatic correspondence with Great Britain, April and July 1865, pp. 362, 365, 367, 388, 394, 397, 407, 421, 422, 423; proclamations May 10th 1865 (13 Stat. p. 757), May 22d 1865 (13 Stat. p. 758). See Schedule of proclamations in Appendix B. to Lawrence's Rep. on War Claims, 1st sess. 43 Cong.

surrection was extended so as to declare eleven states, with unimportant exceptions, in rebellion.[4]

Flagrant war was continued in those states until the President's proclamation of August 20th 1866,[5] proclaimed the "insurrection at an end." A "state of war" continued beyond this time, more or less extensive in its theatre—"*non flagrante bello sed nondum cessante bello.*"[6]

This condition of war is recognised by the law of nations.[7]

The existence of what is called "*a state of war*" after flagrant war has ceased is recognised on the same principle as the personal right of self-defence.[8]

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[4] *The Venice*, 2 Wallace 277. See proclamation of August 16th 1861, &c., and July 1st 1862, 12 Stat. 1260–1266. Proclamation September 22d 1862, and January 1st 1863, 12 Stat. 1267–1269. See letter of Quartermaster-General M. C. Meigs, in appendix to Lawrence's Report on War Claims and schedule of proclamations in the Report.

[5] McPherson's History of Reconstruction 194; 13 Stat. 763. Tennessee, June 13th 1866; 14 Stat. 812, 816. Sundry States, April 2d 1866. Texas, August 20th 1866. *Fleming* v. *Page*, 9 Howard 615; *Cross* v. *Harrison*, 16 Howard 189; *United States* v. *Anderson*, 9 Wallace 56; *Grossmeyer* v. *United States*, 9 Wallace 72; Lawrence's Wheaton, 513 note; *The Protector*, 12 Wallace 700. Treaty of Washington of May 8th 1871, art. 12; 17 Stat. 867. Act March 2d 1867, § 2; 14 Stat. 428. *Grossmeyer* v. *United States*, 4 Court of Claims; *Martin* v. *Mott*, 12 Wheaton; 29 Law Reporter, July 1861, p. 148.

[6] *Mrs. Alexander's Cotton*, 2 Wallace 419; Lawrence's Rep. on War Claims in 1st sess. 43d Congress, Secretary Fish's opinion, p. 79.

[7] *Cross* v. *Harrison*, 16 Howard 164; Whiting's War Powers 55; Article 2 of Francis Lieber, rules for government of the armies, Scott's Digest Military Laws, p. 442, § 1142; *Elphinstone* v. *Bedreechund*, 1 Knapp's P. C. R. 300, cited in *Coolidge* v. *Guthrie*, by SWAYNE, J., U. S. Circuit Court, southern district of Ohio, October 1868. Appendix to Whiting's War Powers 591, edition 1871. Letter of Hon. Hamilton Fish, Appendix C. to Lawrence's Report on War Claims.

For sundry cases relating to the rebellion, see *The Prize Cases*, 2 Black 635; *Mrs. Alexander's Cotton*, 2 Wallace 404; *The Venice*, 2 Wallace 258; *The Baigorn*, 2 Wallace 474; *Mansan* v. *Insurance Company*, 6 Wallace 1; *The Ouachita Cotton*, 6 Wallace 52; *Hanger* v. *Abbott*, 6 Wallace 532; *Coppell* v. *Hall*, 7 Wallace 542; *McKee* v. *United States*, 8 Wallace 153; *United States* v. *Grossmayer*, 9 Wallace 72; *Vallandigham's Case*, Appendix to Whiting's War Powers, (ed. of 1871) 524; *The Circassian*, 2 Wallace 150; *Cummings* v. *Missouri*, 4 Wallace 316; *Ex parte Garland*, 4 Wallace 374; *Mississippi* v. *Johnson*, 4 Wallace 497.

[8] 1 Bishop Crim. Law (5th ed.), §§ 301, 305, 838, and numerous authorities cited. *Stewart* v. *State*, 1 Ohio State 66–71.

During some portions of the period of rebellion flagrant war existed, not only in the states proclaimed as in rebellion, but in Missouri, Kentucky, Maryland, West Virginia, and temporarily in parts of Indiana, Ohio and Pennsylvania.

The fact of flagrant war without any proclamation or declaration by Congress is a matter of history, and is judicially recognised by the courts.[9]

War, either foreign or civil, may exist where no battle has been or is being fought.[10]

The rights, duties and liabilities of governments in cases of foreign war or invasion are generally well defined by the laws of nations.

The usages and laws of nations, applicable in cases of war between independent nations, apply generally to civil wars, including the recent war of the rebellion, and especially when as in the states proclaimed in insurrection the lawful state governments were entirely overthrown, and the courts and civil authority of the National Government equally disregarded and powerless.

The Supreme Court of the United States decided in December 1862, that—

"The present civil war between the United States and the so-called Confederate States has such character and magnitude as to *give the United States* the same rights and powers which they might exercise in the case of a national or foreign war."[11]

The court determined also that the citizens in the rebel states owed "supreme allegiance to the" National Government, and that "in organizing this rebellion they have *acted as states*."

In the prize cases it was insisted by counsel "that the President in his proclamation admits that great numbers of persons residing"

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[9] *Prize Cases*, 2 Black 636; *Ex parte Milligan*, 4 Wallace 140; Whiting's War Power of the President 140; President Grant's veto message, June 1st 1872; Id. June 7th 1872; Id. January 31st 1873; Id. February 12th 1873; Lawrence's Wheaton 513, note.

[10] Const., art. 3, § 3, clause 3; *Ex parte Milligan*, 4 Wallace 127, 140, 142. *Luther* v. *Borden*, 7 How. 1; *Grant* v. *United States*, 1 Nott & Hopkins, Court Claims 41; s. c., 2 Id. 551; Whiting's War Powers 43; *Ex parte Milligan*, 4 Wall. 127. The court say to justify martial law "the necessity must be actual and present: Paschal, Annotated Const., 212, note 215; *Ex parte Bollman*, 4 Cranch 126; *United States* v. *Burr*, 4 Cranch 469–508; Sergeant Const., ch. 30 [32]; *People* v. *Lynch*, 1 Johns. 553.

[11] *The Prize Cases*, 2 Black 636; Vattel 425, § 294.

in the rebel states "are loyal," and the court were asked to hold "that they * * have a right to claim the protection of the Government for their persons and property, and to be treated as loyal citizens."

But the court answered this by declaring that—

"*All persons* residing within this territory where property may be used to increase the revenues of the hostile power are in this contest liable to be treated as *enemies* though not foreigners."[12]

The power of a nation over its own rebel citizens is greater in a civil war than over alien enemies, because over the former it "may exercise both belligerent and sovereign rights"[13]—that is, the belligerent rights of war, and the sovereign right to confiscate and punish for treason—while over alien enemies it can only exercise belligerent rights, and enforce the criminal laws other than those defining treason.

In the prize cases, NELSON, J., said, "This Act of Congress, [July 13th 1861,] we think, recognised a state of civil war between the Government and the Confederate States, and made it territorial." The government was at war with all the rebel states, just as much so as it was in other wars with England or Mexico. In *The Venice*, 2 Wallace 274, Chief Justice CHASE said: "Either belligerent may modify or limit its operation as to persons or territory of the other, but in the absence of such modification or restriction judicial tribunals cannot discriminate in its application." The District of Columbia was never declared in insurrection, but martial law was proclaimed, and it was subjected to the laws of war. It was a fortified military stronghold, and all civil authority was

[12] *Prize Cases*, 2 Black 674, 678, 693; Halleck's Laws of War 425, 446; *Mrs. Alexander's Cotton*, 2 Wallace 419; Whiting's War Power of the President 58; Vattel 425, § 293; Bynkershoek, Laws of War 25; *United States* v. *Anderson*, 9 Wallace 64; Whiting's "War Claims" affixed to "War Powers," ed. of 1871, p. 335; Marcy's Letter to Jackson, January 10th 1854, House Ex. Doc. 41, 1st sess. 33d Cong.; Huberus, tom. ii., l. i, tit. 3, De Conflictu Leg., § 2; *Jecker* v. *Montgomery*, 18 Howard 112; *The Peterhoff*, 5 Wallace 60.

[13] *Prize Cases*, 2 Black 673; 4 Cranch 272; Whiting's War Powers 44–47. But see Lawrence's Wheaton, 8th annotated ed. sup., 23. Whiting, in his War Powers, says: "*Rebels in civil war*, if allowed the rights of belligerents, are not entitled to all the privileges usually accorded to *foreign* enemies," ed. of 1871, p. 331. *Ex parte Milligan*, 4 Wallace 3, 128.

President Grant's veto messages of June 1st and June 7th 1872, and February 12th 1873; Debates on Sue Murphy's claim, 71 Globe 299, 386, 86, 161, 278.

superseded so far as deemed neeessary, and the eivil safeguards of the Constitution withdrawn from the inhabitants.[14]

Grotius, referring to foreign invasion and the liability of an invaded city to make eompensation, assigns as a reason why "no action (that is, no claim) may be brought against a eity for damages by war," that it is "in order to make every man more eareful to defend his own."[15]

Vattel assigns as reasons that the damages would be so great that "the public finanees would soon be exhausted. * * * Besides these indemnifications would be liable to a thousand abuses, and there would be no end of the partieulars. It is therefore to be presumed no sueh thing was ever intended."[16]

There is a maxim, too, the foree of which eannot be overlooked: *Salus populi suprema lex.*

The fifth article of amendments to the Constitution provides that—

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[14] The date of the President's proclamation declaring martial law in the District of Columbia is September 15th 1863, (13 Stat. at Large, p. 734,) and the continuance thereof in the language of the proclamation was "throughout the duration of the said rebellion."

There might and probably would be a difference of opinion as to the date at which martial law ceased to exist in the district. The President's proclamation of the second of April 1866, (14 Stat. at Large, p. 811,) may without impropriety be taken to fix the limitation referred to.

See the trial of the conspirators, May 1865; Attorney-General's opinion, July 1865; 11 Opinions 297.

In Ex parte Milligan, 4 Wallace 137, CHASE, C. J., said:—

"The Constitution itself provides for military government as well as for civil government. And we do not understand it to be claimed that the civil safeguards of the Constitution have application in cases within the proper sphere of the former.

* * * * * * *

"We think, therefore, that the power of Congress, in the government of the land and naval forces, and of the militia, is not at all affected by the fifth or any other amendment. It is not necessary to attempt any precise definition of the boundaries of this power. * * * * *

"There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war, without the boundaries of the United States, or in time of rebellion and civil war, within states or districts occupied by rebels treated as belligerents; and a third, to be exercised in time of invasion or insurrection within the limits of the United States, or, during rebellion, within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise."

[15] Book 3, ch. XX., § 8, p. 290.

[16] Vattel, ch. XV., p. 403.

No person shall be * * deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

The phrase "due process of law," in this connection means that:—

The right of the citizen to his property as well as life or liberty could only be taken away upon an open, public, and fair trial before a judicial tribunal, according to the forms prescribed by the laws of the land.[17]

If there were no other provision in the Constitution on the subject of life or property, the life of a rebel citizen could never be lawfully taken by command of the Government, even in battle, and property for army supplies, hospitals, and other military purposes, could never be taken for the public use against the owner's will, except by the tedious process of a judicial proceeding in court, in the exercise of the civil right of eminent domain.

But if it be said that on some principle recognised among nations, justified by reason and necessity, rebels forfeit all constitutional rights, yet some of the provisions of the fifth amendment still cannot apply to a state of war, because a citizen who is conscripted against his will, arrested, and carried into the army, is deprived of his "liberty" without any "process of law." The war-power in such case is operating, and the fifth amendment so far yields to it, and is not applicable to such case.[18]

Since war could not be carried on if all the provisions of the fifth amendment applied in time and on the theatre of war, the Constitution gives to Congress the power—

"to define and punish offences against the *law of nations.*"

"to declare war;

"to raise and support armies;

"to provide for the common defence and general welfare,"

and makes other provisions relative to a state of war.[19]

The Constitution recognises and, *for their appropriate uses, adopts* "the law of nations," and these include the *laws of war.*

The *laws of war*, equally with the amendments to the Constitution, determine certain rights of person and property. Here,

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[17] Paschal, Annotated Constitution, 260, note 257; Whiting's War Powers 60.

[18] In *Ex parte Milligan*, 4 Wallace 137, *per* Chief Justice CHASE. (See 11 Opinions 297.)

[19] Whiting's War Powers 27.

then, *in the Constitution* are two systems of law, each having a purpose. By well-known legal rules of construction they are to be construed *in pari materia;* effect is to be given to each, so that neither shall fail of having an object.

Both systems of law cannot have full or exclusive force, effect and operation at the same time and place, or over the same rights of person and property.[20]

The laws of peace, and the amendments to the Constitution for the security of life and property, apply in time of peace and in time of war where no war or state of war exists.[21]

But where war is actually flagrant, or a state of war, the laws of war prevail; and, so far as clearly necessary for all purposes of the war, they are so far exclusive that no antagonistic law or exercise of jurisdiction can be allowed.[22]

It is not to be inferred from this that there is no protection for life or property. In all cases the laws[23] of nations, including the laws of war, promise protection to life and property, as clearly and as sacredly as if written in plain terms in the Constitution. The *laws of war* are, therefore, *constitutional laws.*

Loyal men residing in loyal states during the rebellion, but having property, real or personal, in states proclaimed in rebellion, held it not as enemies, but nevertheless subject to the laws of war as affecting loyal citizens in a theatre of war.[24]

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[20] Whiting's War Powers 51.

[21] *Ex parte Milligan*, 4 Wallace 127. This view is taken in *Grant* v. *U. S.*, 1 N. and H. Court Claims 44; but that case cannot be sustained in some other respects.

[22] In *Ex parte Milligan*, 4 Wallace 127, the test applied as to whether the laws of war were in force *quoad rights of person*, was whether the civil courts were open, and it was held that the court was the judge of this. And see Coke, Com. Lit., lib. 3, ch. 6. sec. 412, p. [249 *b.*]

Lawrence's Wheaton 526, (2 Am. ed.) Lawrence says this is the English rule, and applies to the seizure of real estate, "so as the courts were shut up, *et silent inter arma leges.*"

Grant v. *U S.*, 1 N. & H. Court Claims 41.

[23] There is a summary of these by Francis Lieber, p. 441 *et seq.*, in Scott's Digest of Military Laws United States, and in the appendix to report of trial assassination of President Lincoln.

[24] Lawrence's Wheaton 565–576; *The Gray Jacket*, 5 Wallace 342–364; Whiting's War Powers [43d ed., 1872,) p. 582; Attorney-General's opinion, November 24th 1865; 11 Opinions 405; Elliott's Claim, September 7th 1868; 12 Opinions 488; *Prize Cases*, 2 Black 674; Senator Carpenter in Cong. Rec Mch 19th 1874.

From what has been said it will be seen that the laws of war prevailed—

1. Generally in the eleven states proclaimed in rebellion.

2. In large portions of Missouri, Kentucky, Maryland and West Virginia during the state of war.

3. In the District of Columbia.

4. In a small portion of Ohio and Indiana for a few days.

5. In a small portion of Pennsylvania during the actual existence of Lee's invasion.

The citizens of the eleven seceded states, for the period of war and by strict law, can only claim those rights of property accorded by the law of nations.

Elsewhere where actual war existed the rights of person and property, so far as they were interrupted by warlike operations, are, in considering the liability of the government, to be determined by the laws of war.

The laws of war affecting rights of person and property exist independent of legislative sanction back of the Constitution itself. It does not make, but recognises them as existing and known laws. This common law of war is liable to change by treaty stipulations, by circumstances, and for all internal purposes Congress may, and during the rebellion did, materially change it.[25]

Congress has since wisely ameliorated[26] its rules, or made concessions gratuitously in the interest of justice, humanity or benevolence.

But the right of military authorities to seize, use or destroy property by the laws of war, is not abridged merely because Congress has provided other modes of seizing and disposing of property. A statute which does not by negative words necessarily abolish a common-law rule leaves the latter in force.[27]

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[25] *United States* v. *Klein*, 13 Wallace 128.

[26] Act March 12th 1863, 12 Stat. 591; *Mrs. Alexander's Cotton*, 2 Wallace 404; Act May 18th 1872, 17 Stat. 134; Act March 3d 1871, 16 Stat. 524; Act May 11th 1872, 17 Stat. 97; Act March 3d 1873, 17 Stat. 577; House Mis. Doc. 16—2d sess. 42d Cong.; Mis. Doc. 21, Mis. Doc. 213, Mis. Doc. 218, 2d sess. 42d Cong.; Mis. Doc. 12, 3d sess. 42d Cong.; Joint Res. No. 50, 1st sess. 39th Cong., June 18th 1866; Joint Res. No. 99, 1st sess. 39th Cong., July 28th 1866; Act July 4th 1864, ch. 241, 1st sess. 38 Cong.; *United States* v. *Klein*, 13 Wallace 128.

[27] *Mrs. Alexander's Cotton*, 2 Wallace 404, held "cotton in the Southern rebel districts was a proper subject of capture by the government during the rebellion

As during and since the war rights of property were, and are affected by the laws of war and by statutes independent of them, it becomes necessary to consider rights of property as affected by both classes.

Questions may arise in several classes of cases relating to compensation for property, *real or personal*, taken, used, destroyed or damaged on land or sea:

1. By the enemy.

2. By the government military forces in battle, or wantonly or unauthorized by troops.

3. By the temporary occupation of, injuries to, and destruction of property caused by actual and necessary government military operations in flagrant war.

4. And as to property useful to the enemy, seized and destroyed, or damaged, to prevent it from falling into their hands.

Upon ordinary claims the government is not liable for interest unless by contract so providing.[28]

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on general principles of law relating to war, though private property; and the legislation of Congress authorized such captures." *See Planters' Bank* v. *Union Bank*, 16 Wallace 496.

Congress has power to make rules concerning captures on land. But this does not exclude the exercise of the military right of capture by the common law of war: *Brown* v. *United States*, 8 Cranch 110, 228, 229.

[28] American Law Review, Boston, July 1867, vol. 1, p. 657, referring to *Todd's Case* in Court Claims.

Interest has always been paid upon the advances of the *states* for war purposes.

The Revolutionary War.—Acts of Congress of 5th August 1790, and May 31st 1794.

The War of 1812-15.—Message of President Monroe and accompanying papers upon the case of Virginia. (See Senate Documents, 18th Congress, 1st session, 3d vol. document 64.)

Act of March 3d 1825, (United States Laws, vol. 4, page 132.)

Maryland, United States Laws, vol. 4, page 161.

Delaware, United States Laws, vol. 4, page 175.

New York, United States Laws, vol. 4, page 192.

Pennsylvania, United States Laws, vol. 4, page 241.

South Carolina, United States Laws, vol. 4, page 499.

Act of April 2d 1830.

Indian and other Wars:—

Alabama, United States Laws, vol. 9, page 344.

Georgia, United States Laws, vol. 9, page 626.

Washington Territory, United States Laws, vol. 17, page 429.

New Hampshire, United States Laws, vol. 10, page 1.

Chapter II.

OF PROPERTY TAKEN, USED, DAMAGED, OR DESTROYED IN THE STATES PROCLAIMED IN REBELLION.

As to the eleven states proclaimed in rebellion during a state of war, it may be said in general terms that the United States, by the strict rules of international law, incurred no liability for property taken, used, damaged or destroyed therein by Government authority, so far as dictated by the necessary operations of the war, nor by the operations of the enemy. This is well settled by every writer on the laws of war.

Bynkershoek says :—

"It is a question whether our friends are to be considered as enemies, when they live among the latter, say in a town which they occupy. Petrinus Bellus de R. Milit., part 2, tit. 11, note 5, thinks they are not. Zaueh, de Jure Fee. part 2, § 8, q. 4, gives no opinion. I think that they must be considered as enemies. * * * The thing does not depend only on the *quo animo;* for, even among the subjects of our enemy there are some who are not hostilely inclined against us; but the matter depends upon the law, because those goods are with the enemy, and because they are of use to them for our destruction."[29]

Halleck says :—

"War * * makes legal enemies of all the individual members of the hostile states; * * *it also extends to property, and gives to one belligerent the right to deprive the other of everything which might add to his strength and enable him to carry on hostilities.*"[30]

"A firm possession is suffieient to establish the eaptor's title to personal or movable property on land, but a different rule applies

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The Mexican War.—United States Laws, vol. 9, p. 236, third section of the act to refund advances, &c., for the Mexican war.

See H. Rep. No. 119, 38th Cong., 1st sess."

Massachusetts advances, Act of July 8th 1870, (16 Stat. 197. Sumner's Sen. Rep. No. 4, 1st sess. 41st Cong., April 1st 1869; Ela's H. Rep. No. 76, 2d sess. 41st Cong.)

[29] Laws of War 25; Manning's Law of Nations, chap. iv. p. 122; Thomas Jefferson vindicated the confiscation of property of colonists who adhered to Great Britain during the revolution on this principle: Jefferson's Works, vol. 3, p. 369. Sumner's Speech, Globe, vol. 71, 380.

[30] International Law 446; Id. 457–460; Globe, vol. 71, 300, Sumner's Speech. January 12th 1869; *Prize Cases,* 2 Black 671–674; Lawrence's Wheaton 596.

to immovables or real property. A belligerent who makes himself master of the provinces, towns, public lands, buildings, &c., of an enemy, *has* a perfect right to their possession and use. * * The possession * * gives a right to its *use* and its *products*."[31]

By modern usage there are, and ought to be, humane limitations on the ancient right of seizure, which restrict it to what is useful in the prosecution of the war or necessary to disable the enemy.[32]

By General Order No. 100, approved by the President April 24th 1863, "instructions for the government of the armies" were issued, which were prepared by the eminent jurist, Francis Lieber, LL. D., embodying the laws of war as recognised among civilized and Christian nations, in which it is declared that—

"Churches, hospitals or other establishments of an exclusively charitable character, establishments of education, museums, &c., * * * may be taxed or *used* when the public service may require it."[33]

The Supreme Court has determined that during the rebellion—

"Cotton in the Southern rebel districts—constituting as it did, the chief reliance of the rebels for means to purchase munitions of war, an element of strength to the rebellion—was a proper subject of capture by the government during the rebellion *on general principles of public law relating to war, though private property;* and the legislation of Congress during the rebellion authorized such captures."

And the court said as to cotton—

"Being enemy's property, the cotton was liable to capture. This rule, as to property on land, has received important qualifica-

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[31] Halleck 447; Wheaton, Int. Law, pt. 4, ch. 2, §§ 5–11; 1 Kent 110; Heffter, Droit International, § 130; Marten's Précis du Droit des Gens, § 280; Requelme, Derecho Pub. Int., lib. 1, tit. 1, cap. 12.

[32] *United States* v. *Klein*, 13 Wall. 138; Whiting's War Powers 48, 52, 53; Lawrence's Wheaton 630; Dana's Wheaton, sect. 256, note 171; Halleck 448–451; Vattel, Law Nat., 365, book 3, chap. 9; Bynkershoek's Laws of War; *Brown* v. *United States*, 8 Cranch 122, 228; Globe, vol. 71, 383; 1 Kent 92, 93, 120; *Alexander* v. *Duke of Wellington*, 2 Russell and Mylne 35; 1 Kent's Com. 357; *United States* v. *Padelford*, 9 Wallace 531.

Cooledge v. *Guthrie*, United States Circuit Court, southern district Ohio, October 1868, appendix 591 to (43d ed., 1871) Whiting's War Powers.

Mrs. Alexander's Cotton, 2 Wall. 419; 1 Kent 92, 93; *United States* v. *Klein*, 13 Wall. 137.

[33] Scott's Digest, Military Laws, 446. See McPherson's chapter "The Church and the Rebellion," History of Rebellion, 460, &c.

tions. It may now be regarded as substantially restricted 'to special cases, dictated by the necessary operation of the war,' and as excluding, in general, the seizure of the private property of pacific persons for the sake of gain. The commanding general may determine in what special cases its *more stringent application is required by military emergencies.*"[34]

Tobacco and other property was also an element of strength, and by the laws of war might equally with cotton, and upon the same principles, be destroyed.[35]

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[34] *Mrs. Alexander's Cotton*, 2 Wallace 419.

As to the liability of the Government *generally*, see Delano's resolution in the House of Representatives, January 30th 1866.

See Debates in Globe, vol. 56, pp. 509–512.

This resolution was reported from the Committee of Claims by Hon. C. Delano, now Secretary of the Interior. (See House Rep., No. 10, 1st Sess. 39 Cong., January 18th 1866.)

Mr. Delano said—

"We are not *almoners* merely *for the nation*, and *have no just right to impose increased taxation in order to gratify our feelings of benevolence*, nor to establish principles of abstract justice and equity, *when there is no rule or law requiring it.*"

The judge-advocate general decided that cotton taken to strengthen fortifications and so destroyed has been regarded as a "loss by casualty of war." (Digest of Opinions Judge-Advocate, 97–8.) (See Opinions, vol. 26, p. 247; *Parham* v. *The Justices*, 9 Georgia 341.) The Act of February 9th 1867, 14 Stat. 397, indicated the sense of Congress by declaring that no payment should be made for property destroyed in the insurrectionary states.

The Act of June 1st 1870, 16 Stat. 649, authorized payment to Cutler for cotton seized by General Grant for military purposes, Globe, vol. 78, 3085, April 29th 1870. But Cutler had raised the cotton by contract with the Government made under the captured and abandoned property act.

The commissioners of claims allowed for cotton used for beds in hospitals. See first report, Mis. Doc. 16, 2d sess. 42d Cong., p. 7.

The right to seize and destroy cotton to impair the power of the enemy was considered before the commission under 12th article, treaty of May 8th 1871, between the United States and Great Britain. (See Hale's report to Secretary of State, November 30th 1873.) Authorities were cited: Vattel, book 3, c. 9, §§ 161, 163, 164; Twiss, vol. 2 (war), pp. 122–124; Rutherford, book 2, c. 9, § 16; *Mrs. Alexander's Cotton*, 2 Wall. 404; *The United States* v. *Padelford*, 9 Id. 531; *The United States* v. *O'Keefe*, 11 Id. 178; 1 Kent's Com. 92, 93.

[35] The commissioners of claims, under the Act of March 3d 1871, in their third annual report of December 8th 1873, House Mis. Doc. No. 23, 1st sess., 41st Cong. p. 3, say:—

"Tobacco was by law never made an army supply till the Act of March 3d 1865, provided that it might be furnished at cost to those who desired it, and at their expense.

"After the capture of Atlanta, in September 1864, General Sherman issued an order on the 8th of September 1864, authorizing the chief commissary of subsist-

While these are the rights which the Government *might* lawfully enforce against all the inhabitants of the seceded states during actual insurrection, yet in practice they were wisely and humanely modified by acts of Congress, and the military authorities in virtue of their general power in special cases advised departures from strict rules.[36]

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ence to take possession of and issue to the troops all the tobacco in Atlanta, and give certificates thereof to the owners, to be accounted for.

"Pursuant to this order, tobacco was taken, and the commissary department recommended, 'As this tobacco was taken *by order of General Sherman* and issued to the troops *in lieu of other rations*, and as the loyalty of the claimant is clearly established,' that payment should be made.

"We have strictly followed this precedent, and have not allowed for tobacco except when taken under this order:" 3d Genl. Rep. Com. of Claims, art. 6, p. 3.

The commission of claims, under 12th article of treaty of 8th May 1871, between the United States and Great Britain, adopted the same principle: Hale's report to the Secretary of State, November 30th 1873, page 45.

[36] General Halleck's instructions of March 5th 1863, to the commanding officers in Tennessee, said:—

"The people of the country in which you are likely to operate may be divided into three classes: 'First. The truly loyal. Where it can possibly be avoided, this class of persons should not be subjected to military requisitions. It may, however, sometimes be necessary to take their property, either for our own use or to prevent its falling into the hands of the enemy. They will be paid at the time the value of such property; or, if that be impracticable, they will hereafter be fully indemnified. Receipts should be given for all property so taken without being paid for."

(Lawrence's Wheaton, sup. p. 40.) This related only to Tennessee, and after March 5th 1863, the general rule was prescribed, by an order of the War Department, July 22d 1862, as follows:—

"Ordered, that the military commanders within the states of Virginia, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas and Arkansas, in an orderly manner, seize and use any property, real or personal, which may be necessary or convenient for their several commands as supplies or for other military purposes, and while property may be destroyed for military objects, none shall be destroyed in wantonness or malice." (Lawrence's Wheaton, note p. 625.)

Halleck's International Law and Laws of War, p. 460, § 17, cites Mr. Marcy, Secretary of War, as giving directions to our commanding generals, during the war with Mexico, that they might obtain supplies from the enemy.

1. "By buying them in open market at such prices as the enemy might exact."

2. They might take the supplies and pay the owners *a fair price, without regard to what they might themselves demand on account of the enhanced value resulting from the presence of a foreign army.*

3. They might require contributions without paying or engaging to pay.

Halleck says: "There can be no doubt of the correctness of the rules of war as here announced by the American Secretary."

He cites many authorities, and the letters from Marcy to Scott and Taylor, &c. (See Ex. Doc. 60, House Reps., 1st sess. 30th Cong. p. 963.)

Congress has also, as a gratuity, provided for the payment

"To those citizens who remained loyal, for stores or supplies taken or furnished during the rebellion for the army and navy of the United States in states proclaimed as in insurrection, including the use and loss of vessels."[37]

The right to take property in the insurgent states, *by the common laws of war*, remained generally in force, but Congress also provided modes of taking property *in statutory modes*.[38]

Loyal citizens residing in the loyal states during the rebellion, but having property, real or personal, in the states proclaimed in insurrection, can, by the strict rules of international law, claim for it no immunity. Its local *situs* imparts to it the character and *status* of enemy's property. It may be lawfully used for military purposes, or destroyed if it will be useful to the enemy.[39]

The property situated in the enemy's country owned by corporations existing by virtue of charters granted by foreign govern-

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As to cotton, &c., Act March 12th 1863, 12 Stat. 591; Act May 18th 1872, 17 Stat. 134; House Ex. Doc. 97, 39th Cong., 2d sess.; Senate Ex. Doc. 37, 2d sess. 39th Cong.; House Ex. Doc. No. 114, 2d sess. 39th Cong.; Senate Ex. Doc. No. 22, 2d sess. 40th Cong.; House Rep. No. 7, 1st sess. 40th Cong.; Senate Ex. Doc. 56, 2d sess. 40th Cong.; House Ex. Doc. 82, 3d sess. 40th Cong.; House Ex. Doc. 113, 3d sess. 41st Cong.; House Ex. Doc. No. 146, 1st sess. 43d Cong.

[37] Act March 3d 1871, 16 Stat. 524; May 11th 1872, 17 Stat. 97; March 3d 1873, 17 Stat. 577. See the reports of commissioners of claims, House Mis. Doc. 16, 2d sess. 42d Cong.; Mis. Doc. 21, Mis. Doc. 213, Mis. Doc. 218, 2d sess. 42d Cong.; Mis. Doc. 12, 3d sess. 42d Cong. Joint Res. No. 50, 1st sess. 39th Cong., June 18th 1866; Joint Res. No. 99, 1st sess. 39th Cong., July 28th 1866; Act July 4th 1864, ch. 240, 1st sess. 38 Cong.

[38] In *United States* v. *Klein*, 13 Wallace 128.

It may be said, in general terms, that property in the insurgent states may be distributed into four classes: 1. That which belonged to the hostile organizations, or was employed in actual hostilities on land. 2. That which at sea became lawful subject of capture and prize. 3. That which became the subject of confiscation. 4. A peculiar description, known only in the recent war, called captured and abandoned property.

As to captured and abandoned property, including cotton, see note 36 *ante*.

Alexander's Cotton, 2 Wallace 421.

See Acts of March 12th 1863, and July 2d 1864. See a compilation of Acts of Congress and rules and regulations prescribed by the Secretary of the Treasury, concerning commercial intercourse with the states declared in insurrection, and as to captured, abandoned, and confiscable property, reprint 1872. Act May 18th 1872.

[39] Lawrence's Wheaton 565–576; *The Gray Jacket*, 5 Wallace 342–364; Whiting's War Powers (43d ed., 1872, p. 582); Attorney-General's Opinion, November 24th 1865, 11 Opinions 405; *Elliott's Claim*, September 7th 1868, 12 Opinions 488; *Perrin* v. *United States*, 4 Court Claims 543; *Prize Cases*, 2 Black 674; Senator Carpenter in Senate, March 19th 1874.

ments, or loyal states, or rebel states, before or since secession, can claim no protection beyond that accorded to other enemy's property. A large part of the property in the insurrectionary states might be held by corporations, and thus be a means of strength to the rebellion.[40]

As by the laws of war the lawful military authorities might destroy houses in these states to prevent them from being a means of aid and comfort to the rebellion, or to hasten its speedy overthrow, so they may much the more be used without liability to make compensation.[41]

The policy determined on by Congress is clearly expressed in the Act of February 21st 1867, which prohibits

"The settlement of any claim for the occupation or of injury to real estate when such claim originated during the war for the suppression of the Southern rebellion in a state or part of a state declared in insurrection."[42]

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[40] This rule is not changed by the fact that the confiscation acts do not apply to corporate property: *Planters' Bank* v. *Union Bank*, 16 Wallace 483.

As to Southern railroad companies, see House Report 34, 39th Cong. 2d sess., March 2d 1867; House Rep. No. 3, 2d sess. 40th Cong., Dec. 11th 1867; Ex. Doc. No. 73, 2d sess. 40th Cong., Jan. 7th 1868; House Rep. No. 15, 2d sess. 40th Cong., Feb. 7th 1868; House Rep. No. 78, 2d sess. 41st Cong., June 9th 1870.

[41] See letter of Quartermaster-General M. C. Meigs of February 26th 1874, in Lawrence Rep. on War Claims No. 262, 1st sess. 43d Congress, March 26th 1874. This report discusses the several classes of War Claims, perhaps more fully than any other made to Congress.

No claim was made for use and occupation in the insurrectionary states before the commission held under twelfth article of the treaty between the United States and Great Britain of May 8th 1871, except "within the *loyal* portions of the United States, or within those portions of the insurrectionary states permanently reclaimed by the United States, and for damages resulting from such use and occupation."

In Mr. Hale's report it is said:—

"The counsel cited the letter of Earl Granville to Mr. Stewart, (No. 23 of parliamentary papers, No. 4, on the Franco-German war, 1871, British State Papers;) Professor Bernard's 'Neutrality of Great Britain,' &c., pp. 440, 454; United States Senate Documents, first and second sessions; 34th Cong., vol. 15, No. 103, pp. 169, 463; *United States* v. *O'Keeffe*, 11 Wallace 178; *Waters* v. *U. S.* (4 C. Cls. Rep. 390); Russell (5 Id. 120); *Filor* v. *United States*, 9 Wallace 45; also *Campbell's Case*, 5 C. Cls. Rep. 252, and *Provine's Case*, Id. 455; Act of July 4th, 1864, 13 Stat. 381."

See letter of Quartermaster-General M. C. Meigs, February 19th 1874, on p. 25 of Lawrence's Report on War Claims, in 1st sess. 43d Cong.; Act March 3d 1813, ch. 513, § 5; Art. 42 Revised Army Regulations of August 10th 1861; Act March 3d 1817, ch. 218, § 2; Act July 4th 1864; Act February 21st 1867.

[42] 14 Stat. 397; 11 Opinions, Nov. 24th 1865, p. 405; 12 Opinions 486, Sept.

By the strict rules of law literary institutions are equally subject to use by the lawful military authorities. But on grounds of public policy nothing but urgent necessity could justify such use. The proper military authorities must, as a general rule, be allowed to judge of the necessity, or military operation could not be successfully carried on.[43]

In the application of the general principles stated there are some recognised exceptions.

The Government, in honor and in law, is bound to make compensation for property of citizens used, damaged or destroyed when—

I. The commander of an army, under proper authority, or other officer duly authorized, in advance or at the time of the use, damage or destruction, distinctly *agrees* with the owner of the property that the Government shall make compensation, and when, *upon the faith of this*, the *promise is accepted* and the property voluntarily surrendered.[44]

7th 1868, declares that "a claim for use and occupation of real estate in Tennessee by the army in January 1863, cannot be settled by the Executive Department of the government, under Act July 4th 1864, and February 21st 1867." *Filor* v. *United States*, 9 Wallace 45; *Provine's Case*, 5 Court of Claims 455; *Kimball's Case*, Id. 252.

[43] See Sumner's speech in Senate, January 12th 1869; 71 Globe, 3d Sess. 40th Congress 301.

Congress has considered the subject since the close of the rebellion. See claim of William and Mary College. Claim for destruction of buildings and property by "disorderly soldiers of the United States during the late rebellion." For House proceedings see Globe, vol. 87, 2d Sess. 42d Congress, pp. 784, 785, (February 2d 1872,) and vol. 88, pp. 934, 940, 941, 942, 943, 1190, 1191, 1192, 1193, 1194, 1195. The bill was defeated. See House Report No. 9, 2d Sess. 42d Congress, January 29th 1872.

East Tennessee University.—Claims for use and occupation of buildings by United States troops. For Senate proceedings in 42d Congress, see Globe, vol. 39, p. 2288, 2d Sess. 42d Congress (April 9th 1872). For House proceedings, see Globe, vol. 93, p. 697 (January 18th 1873). See Senate Report No. 17, 2d Sess. 42d Congress. Vetoed, January 30th 1873. See Senate Ex. Doc. 33, 3d Sess. 42d Congress. See Globe, vol. 93, p. 991, January 31st 1873.

Kentucky University.—Claim for use and occupation of buildings by United States troops. For Senate proceedings, 41st Congress, see vol. 78, p. 3145 (May 2d 1870), vol. 80, p. 5538 (July 13th 1870). For House proceedings, see Globe, vol. 82, p. 480 (January 13th 1871). Approved January 17th 1871. See Statutes at Large, vol. 16, p. 678.

[44] *Steven* v. *United States*, 2 Court Claims 95; *Elliott's Claim*, 12 Opinions Attorneys-General 485; *Provené* v. *United States*, 5 Court Claims 456; *Kimball* v. *United States*, Id. 253; *Waters* v. *United States*, 4 Court Claims 390; *Filor* v. *United States*, 9 Wallace 45; *Ayres* v. *United States*, 3 Court Claims.

But a *contract* is not necessarily created by the mere fact that the highest military authority gives instructions to subordinate officers, or issues orders *to them*, advising them that enemies "will be paid at the time," or that "they will hereafter be fully indemnified."

The Government is not bound, either, by the unauthorized promise of an officer.[45]

The mere fact that a voucher or receipt is given for property taken in enemy's country by a military officer does not make the Government liable to pay for it.[46]

Military officers frequently organize a "board of survey" or commission to assess the value of property taken in the enemy's country, or destroyed on loyal territory. This is done to preserve the history of military operations, to enable superior officers to hold the subordinates to a proper responsibility in the conduct of war.[47] The liability is determined *by the laws of war*.

As to unauthorized contracts see Act March 2d 1861, ch. 84, sec. 10, vol. 12, Stat 220; Joint Res. No. 8, January 31st 1868, 15 Stat. 246; Act June 1d 1862, 12 Stat. 411; 4 Court Claims 75, 359, 549; 5 Court Claims 65; 1 Opinions Attorneys-General 320; 7 Wallace 666; 4 Court Claims 176, 401, 495; 5 Court Claims 302; 8 Wallace 7. And see sundry Acts of Congress in relation to public contracts.

[45] In *Filor* v. *United States*, 9 Wallace 45, the court refer to a case at Key West, of promises for the use of the quartermaster's department, and say it was not, "binding upon the Government until approved by the quartermaster-general." *Ayres* v. *United States*, 3 Court Claims 1.

See the acts relating to the Court of Claims; Act March 3d 1863, 12 Stat. 767, section 12, and other acts cited in the volumes of reports of that court.

"The law of agency, as applicable to the United States, is far more strict than to individuals, for the agent must have *actual authority* in order to bind the Government:" 1 Boston American Law Review, ¾ 58.

[46] The Revised Army Regulations of 1861, as corrected to June 25th 1863, edition of 1867, p. 512, sec. 22, provides that "all property, public or private, taken from alleged enemies, must be inventoried and duly accounted for. If the property be claimed as private, receipts must be given to such claimants or their agents." But this does *not change the laws of war*, and give a liability which does not exist by such law. The laws of war are prescribed by another power, and cannot be abrogated by army regulations.

See Report of November 30th 1873, of Hon. R. S. Hale to the Secretary of State, where the claim of Kater was paid on a voucher, the order of General Sheridan having in effect promised compensation for such property to loyal citizens."

[47] Such valuation was made by order of General Jackson, after the battle of New Orleans, of certain damages to real estate: American State Papers, class

II. When, by the terms of the capitulation of a hostile city or army, there is a distinct stipulation by the proper officer commanding the Union Army that rights of person and property shall be respected, this pledge is to be respected, and a violation of it by military officers clothed with authority to act in the name of the Government would create a liability to repair any damages. But this protection only extends to such enemies as strictly observe neutrality and the terms of the capitulation, and to property the nature of which does not take it out of the condition of neutrality.[48]

And it cannot be an absolute guarantee against unauthorized pillage or other damages incident to surrounding circumstances.

III. The same rule of protection is extended to persons and property where there is no capitulation, but an authorized military proclamation promising it, when a city or district of the enemy is subdued and occupied.[49] This principle will apply generally to duly authorized safeguards.[50]

A passport may be given which does not amount to a safeguard. But a safeguard for the purpose of protection under a flag of truce may amount to a guarantee of the safety of persons, and of such property as may be named, or may reasonably accompany the person, excluding unnecessary valuables.[51]

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ix., claim 752. Such boards were frequently organized during the rebellion: *Justice* v. *U. S.*, 8 Court Claims R. 37; *Heathfield* v. *U. S.*, Id. 214.

[48] *Case of Thorshaven*, Edwards 107; *Alexander's Cotton*, 2 Wallace 421; Vattel, book 3, ch. 18, § 294, p. 425; *The Venice*, 2 Wallace 258; Winthrop's Digest Opinions of Judge-Advocate-General, 1862 to 1868, p. 86 (ed. of 1868), vol. xviii., p. 511, Records of Bureau of Military Justice. *Planters' Bank* v. *Union Bank*, 16 Wallace 468.

The commission under the 12th article of the treaty of 8th May 1871, between the United States and Great Britain, held substantially this.

[49] And while the conditions of the proclamation are observed by the enemy, and hostilities are not renewed by them, the pledge of protection cannot be revoked by military authority: *Planters' Bank* v. *Union Bank*, 16 Wallace 496. See also Act July 13th 1861, § 5 (12 Stat. 257), and President's proclamation, August 16th 1861 (12 Stat. 1262).

[50] See Act February 13th 1862, § 5; Army Regulations of 1861 revised to June 25th 1863 (ed. of 1867), pp. 112, 113.

[51] 1 Kent's Com. 161; Id. 417, § 270; Woolsey's International Law, p. 250; 1 Bello, p. 265; Calvo, 2d vol., p. 97, edition of 1868. In 1863 a person came under flag of truce through the Union lines to New Orleans, then under command of General Banks, bringing a trunk having, as alleged, Confederate bonds. This party was arrested, and afterwards asked reparation. The Judge-Advocate General said: "In regard to the merits of such claim, it need only be said that as far as the rebel securities are concerned the seizure was clearly authorized.

IV. During the rebellion the ordinary laws of war as to enemy's country were, by the general policy of the Government, sanctioned by Congress and the President's proclamation of August 16th 1861, so far modified that in such parts of the rebel states as were permanently occupied and controlled by the Union military forces, and where rebellion had ceased and was no longer probable, the Government assumed to interfere no further with the rights of person and property of the enemy than should be required by necessary subjection to military government.

But this immunity only extends to those who were loyal, or who ceased to engage in, aid or encourage rebellion. And in such case property would be liable to be occupied, taken, damaged or destroyed, as in loyal states.[52]

WM. LAWRENCE.

(*To be continued.*)

RECENT AMERICAN DECISIONS.

Court of Appeals of Maryland.

SAMUEL D. LEWIS *v.* BALTIMORE & OHIO RAILROAD COMPANY.[1]

Where the plaintiff has been guilty of a plain act of carelessness which has contributed to an accident, it is the duty of a court as matter of law, to say that he cannot recover.

Plaintiff desiring to cross a street in Baltimore, after dark, the street lamps being lighted, found a train of railroad cars blocking the crossing. A crowd had collected waiting for an opportunity to cross, and while plaintiff was waiting two women had been prevented by the police from creeping under the couplings, but several persons had climbed up the platforms and thus crossed. After waiting about five minutes plaintiff started to get on the platform with the intention of

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No flag of truce could protect such bonds—which have invariably heretofore been held as illegal and disloyal publications, intended to give aid and comfort to the enemy—from confiscation and destruction. On the contrary, a party availing himself of a flag of truce to bring such securities within our lines would be guilty of a violation of the truce, and become amenable to trial and punishment."

[52] *The Venice*, 2 Wallace 259; *Planters' Bank* v. *Union Bank*, 16 Wallace 483. See letter of February 26th 1874, of Quartermaster-General M. C. Meigs, in appendix to Lawrence's report on War Claims, 1st sess. 43d Cong.; Senate Claims Committee's Report, No. 85, 2d sess. 42d Cong., March 27th 1872; *Mrs. Alexander's Cotton*, 2 Wallace 419; *Prize Cases*, 2 Black 674; Senator Carpenter in Senate, March 19th 1874.

[1] We are indebted for this case to F. C. Latrobe, Esq.—ED. AM. L. REG.

crossing in the same manner, when the train started and his leg was crushed between two cars. *Held*, that such an act was contributory negligence and he could not recover.

The fact that the railroad company was negligent in thus blocking a street crossing contrary to the city ordinances, did not relieve plaintiff from the duty to use ordinary care to avoid danger.

THIS was an action to recover damages for injuries alleged to have been caused by the negligence of the defendant.

The facts were as follows: Between six and seven o'clock of the evening of January 14th 1871, the appellee, by its agents, was engaged in making up a train of freight cars on the line of Howard street, north and south of Camden street, preparatory to its leaving the city. The engine was attached to the south end of the train, some distance below Camden street, and was backing or passing the cars up Howard to couple with cars north of Camden. The plaintiff being at the depot of the defendant, whither he had gone to take the train for Washington, started to go to the Fountain hotel, on the north side of Camden street, a short distance from the corner of Howard. Arriving at the corner of Howard and Camden, he found the crossing blocked by the freight cars of the defendant. He did not see the engine attached to the train, although the street-lamps were lighted, but he admits he did not look particularly for it, nor did he see any employees of the defendant at or about the crossing. The street had been blocked by the cars from twenty-five to thirty minutes, and a number of persons had collected at the crossing waiting for the train to move. The plaintiff waited from five to seven minutes, during which time he saw several persons climb up to the platform of one of the cars, and thus pass to the opposite side of the street; he also saw the police stop two women who were attempting to crawl under the coupling of the cars. Finally, he determined to climb over the platforms of the two cars, and taking hold of the handle used for getting on the cars, while in the act of pulling himself up, with one foot on the platform, and the other hanging down, the train suddenly moved, and his leg was caught and crushed between the two cars. The plaintiff also read at the trial certain ordinances of the city for the purpose of showing that the defendant was making up the train and blocking up the crossing in a manner prohibited by the same.

The opinion of the court was delivered by

ROBINSON, J.—The court, in granting the defendant's and in

refusing the plaintiff's prayers, instructed the jury substantially, that the plaintiff had by *his own negligence contributed to the injury*, and was not, therefore, entitled to recover. We fully agree with the counsel for appellant, that in cases of this kind, the question of negligence, as a general rule, is a matter for the determination of the jury, under instructions from the court defining the degree of care required of each party, according to the nature of the relations borne by the defendant to the party injured.

But we have said more than once, "that cases may and do sometimes occur, where the court is required to declare some *plain act of carelessness* on the part of the plaintiff, to be in *law* such contributory negligence as will prevent a recovery, or, on the other hand, where the proof of negligence on the part of the defendant is so slight and inconclusive in its nature as to demand from the court an instruction as to its legal insufficiency to prove negligence, in order to prevent the jury from indulging in *wild speculation or irrational conjecture.*"

In this, as in all other cases, the burden of proof is on the plaintiff, and although it is the province of the jury to decide matters of fact, when evidence legally sufficient for that purpose is submitted to their consideration, yet this *legal sufficiency* is a question of law, of which the court is the *exclusive judge*, and where the testimony is so slight and inconclusive that no rational mind can infer from it the fact which it is offered to establish, it is not only the right, but the duty of the court, when applied to for that purpose, to instruct the jury that there is no evidence before them to warrant their finding the fact sought to be established.

Without reviewing the many cases in which the subject of negligence has been considered, the question in this and in all cases of the like kind, is whether the injury complained of was caused *entirely by the negligence or improper conduct of the defendant*, or whether the plaintiff so far contributed to the same by *his own negligence or want of ordinary care and prudence*, that but for such negligence or want of care and prudence the injury would not have happened. In the first case the plaintiff would be entitled to recover, in the latter he would not, unless the *defendant, by the exercise of care and prudence*, might have avoided the consequences of the *plaintiff's negligence*. The rule thus laid down in *Tuff* v. *Warman*, 94 E. C. L. Rep. 583, avoids the distinction between *remote* and *proximate causes*, a subject which PIGOTT, C. B., says

has perplexed metaphysicians from the days of the disquisitions of the schoolmen down to the essays of Hume and Browne, and presents the law in clear and intelligent terms, suited to the capacities of men of good common sense and ordinary information.

The question in this appeal resolves itself then into this: was the attempt on the part of the plaintiff to get on the platform of the cars, *under the circumstances, such a glaring act of carelessness* as to amount in law to *contributory negligence?* To this, we think, there can be but one answer. On reaching the crossing at Camden and Howard, instead of waiting until the train had moved, or walking up to Pratt street, the distance of a square only, where he could have crossed without risk, he attempted, although it was dark, to get on the platform of one of the cars, at a time, too, when the defendant was making up its freight-train, and without even looking or inquiring whether an engine was attached thereto. For such negligence it is no excuse to say that he had seen five or six of the crowd of persons there collected make a like attempt without injury, and especially in the face of the admonition given by the police, who, in the very presence of the plaintiff, had prevented two women from exposing themselves to a danger so imminent. The ordinary care which the law required, is the exercise of such caution and prudence as are proportioned to the danger to be avoided, judged by the standard of common prudence and experience. Tested by this standard, the conduct of the plaintiff in thus exposing himself to a danger so threatening, can be viewed in no other light than as an act of carelessness, amounting in law to *contributory negligence.*

But it was also contended that the plaintiff is not prevented from recovering, if the defendant, by the exercise of ordinary care, might have avoided the consequences of the plaintiff's negligence. An action, it is true, will lie in some cases where there has been negligence on both sides, but in such it must appear that the defendant, by a proper degree of caution, might have avoided the *consequences of the plaintiff's negligence*, or, that the latter could not, by ordinary care and prudence, have avoided the consequences of the defendant's negligence. "This, moreover, implies time for the party to become aware of the conduct and situation of the other, for neither could be required to anticipate the other's negligence:" *Northern Central Railway Co.* v. *State, use of Gies*, 31 Md. 366. A man asleep on the highway, or walking, negligently

it may be, upon a railroad-track, is not to be run over, provided it can be avoided by the exercise of ordinary care. Or take the case of a vessel failing to exhibit the proper lights and to take the right side of the channel, as required by the Navigation Act; such acts of negligence are no defence in a suit against a colliding vessel, provided the latter being aware of the negligence of the former, could have avoided the collision by the exercise of ordinary care. Where, however, there is no opportunity for one party to become aware of the negligence of the other, and the injury is occasioned by the concurrent and co-operating negligence of both, it is well settled that no action will lie. In the case before us, if it be conceded there was negligence on the part of the defendant in the use of the engine, at the time of the injury, it is equally clear there was concurrent negligence on the part of the plaintiff in attempting to get on the platform of the car, and although the crossing was temporarily blocked, it cannot be imputed as negligence to the agents of the defendant, that they did not anticipate such recklessness on the part of the plaintiff. After the attempt was made to get on the cars, it was impossible for the defendant to have avoided the injury by the exercise of ordinary care, because there was no interval of time during which the agents of the latter could become aware of the danger to which the plaintiff was exposed.

Then, on the other hand, so far as regards the *prior acts of negligence* of the defendant, such as using an engine on the track in the city, and blocking the crossings in a manner prohibited by the city ordinances, it is very clear that such acts of negligence did not exempt the plaintiff from the use of ordinary care in order to avoid the consequence of the defendant's negligence. The fact that a train of cars is unlawfully blocking a crossing is no reason why a person should throw himself under the wheels, or recklessly expose himself to danger. He is bound, notwithstanding such acts of negligence, to exercise proper care and prudence, and if he fails to do so, he cannot hold another responsible for an injury which may be fairly traced to his own negligence.

In any aspect, therefore, in which this case may be considered, we are of opinion, there was *contributory negligence on the part of the plaintiff*, and that the judgment below ought to be affirmed.

Judgment affirmed.

Rauch v. *Lloyd*, 31 Pa. St. 358, bears a close resemblance to the principal case. There the plaintiff, a lad of six or seven years, was on his way home, when he

found his way blocked at a public crossing by a long train of cars, without any person in charge. He attempted to creep under the cars, the cars were moved, and he was injured. The jury found for the defendants, apparently on the ground of contributory negligence. The Supreme Court, however, reversed the judgment, holding that the cars were unlawfully upon the public crossing, and that, considering the age of the child, and the other circumstances of the case, no negligence could be imputed to him. WOODWARD, J., said, *obiter*, in delivering the opinion of the court, "I quite agree with the learned judge that if the plaintiff had been an adult of ordinary prudence and discretion, he would have no right of action; for, however blameworthy the defendants may have been in leaving their cars on the crossing, common prudence would have restrained him from attempting to pass under them, and an adult would be bound to use common prudence."

In the principal case, the court held the act of the plaintiff to be "an act of carelessness amounting in law to *contributory negligence*." The question of negligence having generally been considered a question of fact to be determined by the jury under the circumstances of each case, it may be worth while to examine briefly the decisions in the different state and the Federal and English courts, to learn how far there has been a departure from this rule.

NORTH CAROLINA.—In *Herring* v. *Wil. & Ral. R. Co.*, 10 Ired. 402, it is said, "What amounts to negligence is a matter of law." So also *Avera* v. *Sexton*, 13 Ired. 253; but this statement cannot be taken in its broadest sense, for, in *Lambeth* v. *N. C. R. Co.*, 66 N. C. 494, it was held that the question of contributory negligence was one of fact for the jury, acting under the instructions of the court. "The testimony was conflicting in material points, and it was the province of the jury to determine the truth of the matter * * * in accordance with the instructions of his Honor on the questions of law arising upon the ascertained facts." The act of the plaintiff in jumping from a train in motion was held, under the circumstances of the case, not to be negligence in law.

In *Anderson* v. *Steamboat Co.*, 64 N. C. 399, READE, J., said, "The facts being ascertained, negligence is a question for the court. When the testimony is all on one side, or is not contradictory, the court can decide whether there is or is not negligence." In *Biles* v. *Holmes*, 10 Ired. 16, it was said, "What amounts to ordinary care is for the court. The judge below erred in leaving it to the jury. Whether the proofs establish certain facts is for the jury; but what is the legal effect of these facts, supposing them to exist, is for the court." See also *Ellis* v. *P. & R. R. Co.*, 2 Ired. 140; *Heathcock* v. *Pennington*, Id. 640.

MINNESOTA.—*St. Paul* v. *Kirby*, 8 Minn. 154, was an action for injuries arising from a defective sidewalk. The court said the weight of authority is clearly that the question of negligence in cases of this kind is mainly one of fact for the jury, and none of the cases go further than that it is a mixed question of law and fact, which should be submitted to the jury. In *Johnson* v. *Winona & St. P. R. Co.*, 11 Minn. 96, it was said:— "Whether under the circumstances in which the plaintiff was situated it was negligence, is a mixed question of law and fact. Negligence and prudence are relative terms, qualified by the country, the age, the relations and circumstances in which an act is done or omitted. The law can give no certain fixed standard by which a jury shall be governed in inquiries of this character, for the simple reason that there is none. * * These questions are eminently practical, and

are, says Story, 'more questions of fact than law.'" So also *Griggs* v. *Fleckenstein*, 14 Minn. 81.

Ohio.—*Jenkins* v. *Little Miami R. Co.*, 2 Disney 51.

Missouri.—*Smith* v. *Hann. & St. Jo. R. Co*, 37 Mo. 292; *O'Flaherty* v. *Union R,. Co.* 40 Mo. 70; *Morrisey* v. *Wiggins Ferry Co.*, 43 Mo. 380; 47 Mo. 523. It has been there held (*Boland* v. *Missouri R. Co.*, 36 Mo. 491) that where the evidence is all one way, the court may determine the whole case as a question of law; and that the credibility of witnesses and the weight of evidence are for the jury; but whether there is any evidence, or what its legal effect may be, is to be decided by the court. As to railroad crossings at grade, see *Tabor* v. *Mo. Valley R. Co.*, 46 Id. 353.

Maine.—In *Storer* v. *Gowen*, 6 Shep. 174, it was held that the judge below erred in deciding as a matter of law that it was negligence for a bailee to deliver a valuable package to a servant eleven years old. In *Stuart* v. *Inh. of Machias Port*, 48 Maine 477, an action for a defect in a highway, it was held not to be proper to instruct the jury that if they found that the plaintiff was intoxicated at the time of injury, he could not recover. So also *Stratton* v. *Staples*, 59 Id. 94. Whether or not the loud and sudden blowing of a steam-whistle as a signal for starting a train, whereby plaintiff's horse was frightened, was ordinary care, was left to the jury in *Hill* v. *Portland & Roch. R. Co.*, 55 Maine 438.

Louisiana.—Questions of negligence are ordinarily for the jury, but where, in an action for injuries received while getting upon a train in motion, the jury found a verdict for plaintiff, the court reversed the judgment and entered judgment for the defendant, not allowing the case to go to another jury: *Knight* v. *Ponchartrain R. Co.*, 23 Lou. An. 462; *Lesseps* v. *Same*, 17 Lou. R. 361; *Fleytas* v. *Same*, 18 Id. 339; *Carlisle* v. *Holton*, 3 Lou. An. 48.

South Carolina.—Where the slave of the plaintiff lay down on a railroad track amid grass so high as to obstruct a view of him for more than twenty feet, and in this situation was killed, a verdict for the plaintiff was set aside, a new trial refused, and a nonsuit ordered: *Felder* v. *L. C. & C. R. Co.*, 2 McMullan 403. In *Zemp* v. *Railway Co.*, 9 Rich. 94, after a full discussion of authorities, it was held that "what amounts to negligence is a question of law after the facts are ascertained; but that as the jury are to ascertain the facts it becomes a mixed question of law and fact. The judge must tell the jury what is negligence; it is for them to say, in *most cases*, whether the facts sustain the definition." See also *Danner* v. *S. C. R. Co.*, 4 Rich. 329.

California.—In *Innis* v. *The Senator*, 1 Cal. 459, it was held that for a vessel at anchor in a channel during the night not to exhibit a light is negligence *per se*.

Gerke v. *Cal. Nav. Co.*, 9 Cal. 251, was an action for injury done to plaintiff's crops through the use of improperly-constructed chimneys on the defendant's boat. Said the court, "What facts and circumstances constitute evidence of carelessness is a question of law for the courts to determine. But what particular weight the jury will give to these facts and circumstances is a matter for the jury." In *Wolf* v. *Water Co.*, 10 Cal. 545, the court left the case to the jury on the question as to whether the defendant acted as ordinarily prudent men do in their own concerns. It was held in *Richmond* v. *Sacr. Val. R. Co.*, 18 Cal. 358, that "whether due diligence or negligence has been shown is a question for the jury, depending upon the particular circumstances." Where the plaintiff, a lad of sixteen years, got upon a train in motion to steal a ride

and was sharply ordered off by the conductor, and, in jumping from the train while moving, was injured, the court said, "Had the plaintiff been a man, of mature age and discretion, it might be said, *judicially*, by the court, * * that he had no one to blame but himself; but being a boy only sixteen years of age, we think it should have been left to the jury to say whether in this case the sharp command of the conductor, accompanied by a show of force, did not, under all the circumstances, amount to compulsion." In *Karr* v. *Parks*, 40 Cal. 188, it was held not to be negligence in law to allow a child of five years of age to go unattended in an unused street near its father's house; and in *Seigel* v. *Eisen*, 41 Cal. 109, the court refused to consider it negligence in law to ride upon the rear platform of a street car.

KANSAS.—Negligence is a question of fact for the jury, both as to its existence and its nature and degree. But it is for the court to determine the measure of duty resting upon the parties, and, when the facts are found or agreed upon, to pronounce upon the question of negligence as a matter of law. *Union Pac. R. Co.* v. *Rollins*, 5 Kan. 180; *Kansas Pac. R. Co.* v. *Butts*, 7 Id. 315; both well considered cases.

IOWA.—*Greenleaf* v. *Ill. Cent. R. Co*, 29 Iowa 15, was an action for injury to a brakesman by defendants' alleged negligence. WRIGHT, J., in delivering the opinion of the court, assumed that "whether a party has or has not been guilty of negligence in a particular case, is a question of mingled law and fact, but when the facts are undisputed or conclusively proved, the question of negligence must as a rule be decided by the court." This case was followed in *Greenleaf* v. *Dubuque & Sioux City R. Co.*, 33 Id. 52. In *Keese* v. *Chicago & N. W. R. Co.*, 30 Id. 81, it was held not negligence *per se* to allow dry grass and weeds to remain on a railroad track, whereby fire was communicated to plaintiff's haystack. See also *Haley* v. *Same*, 21 Id. 26, and *Donaldson* v. *Miss. & Mo. R. Co.*, 18 Id. 289.

INDIANA.—Where the plaintiff's cow, running at large, was killed by the defendants' locomotive (*Ind. & Cinn. R. Co.* v. *Caldwell*, 9 Ind. 397), it was held that the case presented a question of fact for the jury under legal instructions; the facts having been found, the court drew the inference of inexcusable negligence. So to allow stock to pasture in a field, the fence of which included a section of defendants' railroad track, was held to be negligence in law: *Ind. Pitts. & Clev. R. Co* v. *Brownenburg*, 32 Id. 199. When the facts are undisputed, negligence is a question of law: *Gagg* v. *Vetter*, 41 Id. 228. As to railroad crossings at grade, see *Bellefontaine R. Co.* v. *Hunter*, 33 Id. 355.

NEW JERSEY.—*N. J. R. Co.* v. *West*, 4 Vr. 430, was a case where the plaintiff was injured by the negligent running of defendants' car past a street crossing *Held*, on appeal for refusal to nonsuit, that when the facts are clear and undisputed and show a want of ordinary care on the part of the plaintiff, the question should be decided by the court; but if the evidence is doubtful it is for the jury to decide. So in *Central R. Co.* v. *Moore*, 4 Zabr. 268, 824.

MISSISSIPPI.—In *Dix* v. *Brown*, 4 Miss. 131, the case was left to the jury to find the facts under the evidence.

KENTUCKY.—*Green* v. *Hollingsworth*, 5 Dana 173, was detinue for a watch loaned and lost. *Held* to be the province of the court to decide what was gross, ordinary and slight neglect under the circumstances, and of the jury to find whether the facts established negligence. In *Matheny* v. *Wolffs*, 2 Duv. 137, the plaintiff was injured by falling into an excavation carelessly left open by defendant. *Held*, that the degree of prudence required of plaintiff was hard

to define, and should be left to the jury. See also *Louisv. & Nash. R. Co.* v. *Collins*, Id. 114.

PENNSYLVANIA.—The numerous decisions in this state seem to have settled most points that can arise. "The law is well settled that what is, and what is not, negligence in a particular case, is generally a question for the jury and not for the court. It is always a question for the jury when the measure of duty is ordinary and reasonable care. In such case the measure of duty is not fixed, but variable. Under some circumstances a higher degree of care is demanded than under others. And when the standard shifts with the circumstances of the case it is, in its very nature, incapable of being determined as a matter of law, and must be submitted to the jury to determine what it is, and whether it has been complied with": WILLIAMS, J., in *West Chester & Phila. R. Co.* v. *McElwee*, 67 Pa. St. 315. See also *McCully* v. *Clark*, 40 Id. 406, per STRONG, J.; *Glassey* v. *Hestonville Pass. R. Co.*, 57 Id. 174; *Penna. R. Co.* v. *Barnett*, 59 Id. 264. It was said in *Catawissa R. Co.* v. *Armstrong*, 52 Id. 286, that what acts and conduct constitute negligence, or rather whether a given state of facts constitutes negligence, was generally a question of law; and in *Pitts., F. W. & C. R. Co.* v. *Evans*, 53 Id. 254, that "special verdicts are the best machinery for determining railroad cases, because they give all the facts, both those disputed and those undisputed, whereupon negligence becomes purely a question of law." However, in a later case, *Penna. Canal Co.* v. *Bentley*, 66 Id. 34, it was said by Mr. Justice SHARSWOOD—citing *McCully* v. *Clark*, *supra*, "It is said that the facts were not disputed, and that upon the undisputed facts negligence was a question of law. There is no such principle, except where a man violates a plain legal duty;" and this seems to be the better opinion and the existing rule in this state. Such being the general rules, there have been said to be two classes of exceptions, in which negligence becomes a question of law: 1st. Where the standard or measure of duty is defined by law, and is the same under all circumstances; 2d. Where there is such an obvious disregard of duty and safety as amounts to misconduct, *W. C. & P. R. Co.* v. *McElwee*, *supra*; *N. P. R. Co.* v. *Heilman*, 49 Pa. St. 63; *Glassey* v. *Hestonville &c. R. Co.*, *supra*. The following are cases of negligence *per se*: *Reeves* v. *Del., Lack. & West. R. Co.*, 30 Id. 454, *held*, that it was negligence for a train to approach a public crossing, on a curve and through a deep cut, at a high rate of speed. *Powell* v. *Penna. R. Co.*, 32 Id. 414, *held* negligence in defendants to use straw for bedding stock in cars where there was exposure to sparks from the locomotive. *Penna. R. Co.* v. *Zebe*, 33 Id. 318, where the plaintiff's son stepped off the cars on the side opposite the platform, and was killed by a passing train. See also *Penna. R. Co.* v. *Ogier*, 35 Id. 60, citing *Reeves* v. *D. L. & W. R. Co.* and *Penna. R. Co.* v. *Zebe*, *supra*. *Citizens' Ins. Co.* v. *Marsh*, 41 Id. 395; *held* negligence, or rather misconduct, for the captain of a steamboat, racing on the Mississippi, to stand a barrel of oil of turpentine near the furnace to use upon the wood as it went into the fire, whereby the steamboat was destroyed by fire. *North Penna. R. Co.* v. *Heilman*, 49 Id. 60, where the plaintiff approached a railroad track without looking out for a train. To the same effect is the late case of *Penna. R. Co.* v. *Beale*, 30 Leg. Int. 232, affirming that case, where SHARSWOOD, J., says, "There never was a more important principle settled than that the fact of the failure to stop immediately before crossing a railroad track is not merely evidence of negligence for the jury, but negligence *per se*, and a question for the

court." *Pittsburgh & Connellsville R. Co.* v. *McClurg*, 56 Pa. St. 300, where a passenger in a railway car voluntarily put his arm outside the car window and was injured. *Glassey* v. *Hestonville &c. R. Co.*, 57 Id. 172, where it was held in an action *by a parent*, that he was negligent in law in allowing his son, less than four years of age, to run at large in the street, without a protector. *Empire Transportation Co.* v. *Wamsutta Oil Co.*, 63 Id. 14, where part of the measure of duty resting upon defendants as common carriers was to have perfect car-couplings. The defendants' oil-train caught fire, and by reason of a defective coupling the car containing plaintiff's oil could not be uncoupled, but was consumed, with its contents, although it could otherwise have been saved. The jury were instructed to find for the plaintiff.

To show the limits of the rule in this state, the following cases may be added, which were, under the circumstances, held proper to go to the jury: *Penna. R. Co.* v. *Barnett*, 59 Pa. St. 259 (where the whistle of the locomotive was not sounded at a crossing); *McCully* v. *Clark*, 40 Id. 399 (where the defendants permitted a large heap of burning coal to remain unextinguished, by which the plaintiff's warehouse was destroyed); *Huyett* v. *Phila. & Read. R. Co.* 23 Id. 373 (where fire was communicated by the emission of sparks from a locomotive); *Johnson* v. *Bruner*, 61 Id. 58 (where a servant fell through an open hatchway in defendant's mill); *Johnson* v. *West Chester & Phila. R. Co.*, 70 Id. 357 (where, under peculiar circumstances, the plaintiff stepped on a train in motion); *Kay* v. *Penna. R. Co.*, 65 Id. 269.

In cases involving the question of negligence there are usually two questions to be determined: 1st. What was the measure of duty? 2d. Was this measure complied with? Ordinarily the measure is what a reasonable, ordinarily prudent man would have done under the circumstances. In such cases the standard of duty and the compliance with it, are for the jury, and cases of this kind are not to be taken from them, even, it would appear, when the facts are undisputed: *Penna. Canal Co.* v. *Bentley*, *supra*. In some cases the law defines the measure of duty, and the province of the jury is then only to find whether there was performance of that duty or not, and they are to be so instructed. Or, if the facts are found or undisputed, the court may decide upon the whole case. It is only in this last class of cases that it can properly be said, as has been said in many of the states, that where the facts are found, negligence is a question of law. It will be noticed that the cases above cited are mostly those where it was a question of the plaintiff's contributory negligence. It would seem that the courts are less willing to take the question of defendant's negligence from the jury, and will do so only in the plainest cases. In no cases where the conduct of a party has been impugned as negligent has the court instructed the jury that there was no want of care; *Weil* v. *Express Co.*, 7 Phila. 245, per HARE, P. J.

The remarks of Chief Justice LOWRIE in *Citizens' Insurance Co.* v. *Marsh*, *supra*, will not be out of place in this connection: "It is for comparatively very few of the acts of our lives that the law prescribes any definite rule. It is satisfied for most matters with the general direction to all to do the best they can, in reasonable accordance with the customs of society in regard to it; and it approves, if the act done cannot be condemned when measured by the standard of ordinary care, diligence, faithfulness and skill, and allows emulation and good conscience to surpass that standard as far as possible. * * * The law cannot possibly define how the mechanic shall use his tools, or his materials, or

how the physician shall treat his patient, or what acts or omissions shall constitute proper care and skill, or the want of them, and therefore it must be contented with the loose standard of the ordinary. Judges are not expected to know what is proper care and skill, except in some matters of legal practice, and we can have it defined only for each case as it arises, and then it is done by a jury. * * * Hence we say that questions of ordinary care, diligence and skill are to be decided by the jury. But the ordinary is not always the standard of duty; for often the law defines the very act, and even the form of it, that is to be done in given circumstances, and then there is no question of care, skill or negligence to be submitted to the jury, but simply whether the acts required or forbidden by the law have been done. These views may help to draw the distinction between negligence or carelessness, and misconduct."

CONNECTICUT.—*Beers* v. *Housatonic R. Co.*, 19 Conn. 566, is a leading case. The plaintiff's servant was driving cattle along a public highway at the time when the cars usually passed the crossing, as known to him. The cattle were carefully driven, in the same manner as cattle usually are, but the driver was too far from the crossing to be able to reach it after the cars appeared; many of the cattle were injured by the train. The defendants urged that these facts, which were undisputed, constituted negligence in law on the plaintiff's part. The case was, however, left to the jury, who found for the plaintiff, and a motion for a new trial was refused. STORRS, J., said, in delivering the opinion of the court: "The court could not have pronounced that those circumstances proved the existence of negligence, or a want of due care, on the part of the plaintiff, without encroaching on the rights of the jury. * * * Whether there was negligence or a want of care of whatever degree, was, from its very nature, a question of fact." This case was followed in *Park* v. *O'Brien*, 23 Conn. 339, where the court refused to consider the act of the plaintiff in leaving a spirited horse unhitched and unattended in the street, as concurrent negligence in law. The respective provinces of court and jury in cases of this kind are clearly shown in *Bill* v. *Smith*, 39 Conn. 206, an action for injury caused to plaintiff's dredging-machine, while at anchor, by defendant's propeller. "Negligence, in a legal sense, is the omission of some duty imposed by law; the law determines what the duty is; the evidence in the cause determines whether it has been omitted. The former is a question for the court, the latter for the jury. To illustrate: The *law* requires that when two persons in carriages meet each other upon the highway, each shall turn to the right. Whether he does so or not is a question of *fact*. The *law* requires that a man shall in all cases act with reasonable care; what is reasonable care, and whether a man so acts, are questions of *fact*." That is, the part of a jury is simply to find whether there was compliance with the measure of duty, that measure of duty being in most cases reasonable care, and in the smaller number of cases some more specific line of conduct laid down by the court as a rule of law. In *Knight* v. *Goodyear Manf. Co.*, 38 Conn. 438, where defendants' steam factory whistle made a "terrific, discordant and startling" sound which frightened the plaintiff's horse, a quiet animal, judgment was entered on a case stated for the plaintiff.

NEW HAMPSHIRE.—"Negligence is a mixed question of law and fact to be settled by the jury under the instructions of the court": *Norris* v. *Litchfield*, 35 N. H. 277. See a full discussion of authorities in the very late case of *State* v. *Manch. & Lawr. R. Co.*, 52 Id. 528.

VERMONT.—Negligence is held to be

a mixed question of law and fact, but where the facts are admitted, it becomes a question of law: *Briggs* v. *Taylor*, 28 Vt. 183, per REDFIELD, Ch. J., where it was held negligence in law for a deputy sheriff to leave a carriage which he had levied upon, exposed to the weather from September to April. So in *Trow* v. *Vt. Cent. R. Co.*, 24 Vt. 497, an action for running over plaintiff's horse while at large, it was held that if the jury found that the horse was on the highway by his owner's consent, they should, as a matter of law, have been told to find for the defendant. Where there is no evidence of negligence, the court must so instruct the jury; or must find negligence in law, if the facts necessary to establish it are undisputed: *Barber* v. *Essex*, 27 Vt. 70; see also *Robinson* v. *Cone*, 22 Vt. 225.

GEORGIA.—The Code gives a legal definition of extraordinary diligence, being the conduct of "very prudent and thoughtful persons in preserving their own property." *Held*, under this definition, that "the judge has no right to determine what constitutes negligence:" *Wright* v. *Geo. R. & Banking Co.*, 34 Geo. 338, where the injury was caused by a worn-out rail on defendants' track, by which a train was thrown from the track. To the same effect are *Wallace* v. *Clayton*, 42 Id. 443, and *Macon & West. R. Co.* v. *Winn*, 26 Geo. 250.

MARYLAND.—The question has been much discussed in this state. The language of the court in the principal case is taken from *Balt. & O. R. Co.* v. *Shipley*, 31 Md. 368, the two cases being not unlike. Where there is no legal standard or measure of duty, or where the facts are numerous and complicated, the question of negligence is to be submitted to the jury; but where the legal duty imposed upon the plaintiff is clear and well defined, a failure to perform it will, if found by the jury, constitute negligence in law. *Balt. Pass. R. Co.* v. *Wilkinson*, 30 Md. 233, where the plaintiff stepped off a street car at the front end and was injured: the Court of Appeals held that the jury should have been instructed to find contributory negligence. Similarly held in *North Cent. R. Co.* v. *Price*, 29 Md. 440, an ably argued case, where the equitable plaintiff's husband was struck and apparently killed by a train of cars and by gross neglect, left locked up in defendants' station-house where he bled to death. The defendants were held negligent in law. In *Balt. & O. R. Co.* v. *Fitzpatrick*, 35 Id. 32, the plaintiff, a lad of eleven years, came to a street-crossing where a train was being made up, and seeing an opening of five feet in width, attempted to run through, but was caught and injured. The question arose as to whether his acts constituted contributory negligence. The court, in holding that the case was rightly left to the jury, said, "This court has too often decided to be required again to repeat, that the question of negligence or the want of ordinary care in cases like the present, is one of fact for the jury." In another part of the opinion it was said, "we do not desire it to be understood that in our opinion there are no cases where the question of negligence could be properly one of law for the court. Far from it. Many such cases could be suggested, though they are not of frequent occurrence; but such cases always present some prominent and decisive act, in regard to the nature and character of which no room is left for ordinary minds to differ." In *Balt. & O. R. Co.* v. *Dougherty*, 36 Id. 366, Dougherty was killed by a locomotive while walking along the railroad track at night. It was held, two justices dissenting, that the case had been properly left to the jury. In this case all the earlier authorities were reviewed.

MASSACHUSETTS.—In this state the plaintiff, in actions for negligence, is held in *every case* to show affirmatively

the exercise of due care (*Gaynor* v. *Old Col. R. Co.*, 100 Mass. 211; *Gahagan* v. *Boston & Lowell R. Co.*, 1 Allen 190), a rule which, it would appear, has the effect of withdrawing many cases of this sort from the decision of the jury, because if the absence of negligence is not clearly proven by the plaintiff the court will either grant a nonsuit or direct a verdict for the defendants. In *Gavett* v. *Man. & Lawr. R. Co.*, 16 Gray 501, the plaintiff, a woman of seventy years of age, stepped from the train while in motion and was injured; the court directed a verdict for the defendants. The Supreme Court, per BIGELOW, C. J., said:—"There was therefore no proof of due care, and no facts were shown from which any inference of such care could by possibility be drawn by reasonable men, which would support a verdict for the plaintiff." Similarly in *Lucas* v. *New Bedf. & Taunton R. Co.*, 6 Gray 64. "When, therefore," said HOAR, J., in *Gahagan* v. *Boston & Low. R. Co.*, *supra*, "a plaintiff offers no evidence that he was in the exercise of care, but, on the contrary, the whole evidence on which his case rests shows that he was careless, we have held that the court may rightfully instruct the jury as a matter of law, that the action cannot be maintained." In this case the plaintiff's intestate attempted to cross between two freight-cars shackled together and moving slowly. So in *Callahan* v. *Bean*, 9 Allen 401, where the plaintiff, two years and four months old, was held to be guilty of contributory negligence in being allowed to go unattended across a public street—a decision of great hardship, and one which, in view of all its circumstances, it is believed (and hoped) is not generally followed by other courts. In *Todd* v. *Old Col. R. Co.*, 3 Allen 21, the fact that plaintiff's arm was outside the car window at the time of the accident was alone held to preclude recovery. So held in another appeal by the same parties. *Same* v. *Same*, 7 Allen 208. In *Gaynor* v. *Old Col. R. Co.*, 100 Mass. 212, COLT, J., laid down the rule thus: "When the circumstances under which the plaintiff acts are complicated and the *general knowledge and experience of men do not at once condemn his conduct as careless*, it is plainly to be submitted to the jury. What is ordinary care in such case, even though the facts are undisputed, is peculiarly a question of fact. It is the judgment and experience of the jury, and not of the judge, which is to be appealed to." In *Southworth* v. *Old Col. & Newport R. Co.*, 105 Id. 344, it was held not negligence in law for the plaintiff to leave his horse unfastened and unattended in the street. See also *Mahoney* v. *Metropolitan R. Co.*, 104 Id. 73, and *Fox* v. *Sackett*, 10 Allen 535.

NEW YORK.—In the early case of *Foot* v. *Wiswall*, 14 Johns. 304, an action for running foul of the plaintiff's sloop at night, it was held that the facts were exclusively for the jury; whether they would, when ascertained, warrant the charge of negligence, was a matter of law. But in *Ireland* v. *Plank Road Co.*, 3 Kern. 533, it was held that it by no means necessarily followed because there was no conflict of testimony, that the court was to decide the issue between the parties as a question of law. Both cases were left to the jury. So in *Purvis* v. *Coleman*, 1 Bosw. 326, negligence was said to be commonly called, "though improperly," a mixed question,—to be found by the jury under instructions. However, the court said, in *Keller* v. *N. Y. Central R. Co.*, 24 How. Pr. R. 176, "The question of negligence in all cases involves a question of fact, and it is only when the question of fact is free from all doubt that the court has a right to apply the law without the action of the jury," citing *Bernhardt* v. *Renss. & Saratoga R. Co.*, 32 Harr. 165, to the same point. And in a later appeal of this same case, 23 How. Pr. R. 168,

SELDEN, J., used the following language: "Cases may no doubt arise in which the proof of negligence would be so clear and irresistible that the court would be justified in assuming, without submitting the question to the jury, that negligence was established. At the same time, it must be obvious that such cases must be rare." And again: "It would not be easy to suppose a case," &c. In accordance with this doctrine we find it held to be negligence *per se* to allow a child of four years to go unattended in the street: *Mangom* v. *Brooklyn R. Co.*, 36 Barb. 230. So of a child seventeen months old, (though here there was not negligence on defendant's part, and this point was a dictum), *Kreig* v. *Wells*, 1 E. D. Smith 74, (though not so held of a child eight years old: *Drew* v. *Sixth Av. R. Co.*, 26 N. Y. 49; nor of a child three years old, in charge of a sister nine and a half years old: *Ihl* v. *Forty-second street R. Co.*, 47 Id. 317; nor of one six years old: *Cosgrove* v. *Ogden*, 49 N. Y. 255). In *Sexton* v. *Zett*, 44 N. Y. 430, proof of fact that the defendant dug a ditch across a public sidewalk and allowed it to remain open in the night-time, with no provision for warning travellers, establishes negligence as a matter of law. In *Phillips* v. *Renss. & Saratoga R. Co.*, 57 Barb. 652, it was said that ordinarily to get upon a train while in motion is negligence *per se*, but that circumstances may justify doing so, as was the case there. So in *Filer* v. *N. Y. C. R. Co.*, 49 N. Y. 47. In *Thrings* v. *Central Park R. Co.*, 7 Rob. 616, the plaintiff, a boy, was injured while attempting to get on a train in motion. There were no palliating circumstances; a nonsuit was therefore ordered. In *Brooks* v. *Buf. & Niagara R. Co.*, 25 Barb. 600, where plaintiff drove his team upon the track and stopped there to see if a train was coming, it was held error not to have nonsuited him, although there was evidence of defendants having been negligent. So in *Haring* v. *N. Y. & E. R. Co.*, 13 Barb. 9, where the plaintiff drove across the track at the rate of a mile in about four minutes, approaching the track between high embankments. There was negligence on defendants' part, but a motion to set aside a nonsuit was denied. So where plaintiff drove across a track on a trot, without taking any precaution to learn whether a train was approaching, it was held that he ought to have been nonsuited: *Dascomb* v. *Buff. & State Line R. Co.*, 27 Barb. 22. See also *Davis* v. *N. Y. C. R. Co.*, 47 N. Y. 400; *Delafield* v. *Ferry Co.*, 5 Rob. 207, and *Willis* v. *Long Isl. R. Co.*, 34 N.Y. 616.

MICHIGAN.—Negligence is a question of fact, but where negligence on the plaintiff's part is the only inference that can be drawn from the evidence, the jury may be instructed to find for the defendant: *Detroit & Milw. R. Co.* v. *Van Steinburg*, 17 Mich. 99. A person about to pass a railroad track is bound to ascertain whether a train is approaching; if he fails to do so, but ventures blindly on the track, his conduct is negligence in law: *Lake Shore & Mich. South. R. Co.* v. *Miller*, 25 Id. 274.

DELAWARE.—Negligence is a question of fact for the jury: *Burton* v. *Phila., Wilm. & Balt. R. Co.*, 4 Harr. 252.

NEBRASKA.—It is the duty of the court to tell the jury what facts will amount to negligence, and to leave it to the jury to find whether such facts have been found or not: *Meyer* v. *Midland Pac. R. Co.*, 2 Nebr. 319.

ILLINOIS.—Negligence is a question of fact, except where it consists in the omission of a duty imposed by positive requirement of law: *Toledo, Peoria & Warsaw R. Co.* v. *Foster*, 43 Ill. 417, where the question arose as to whether a locomotive whistle should have been sounded or not at a crossing. See also

Gal. & Chicago R. Co. v. *Dill*, 22 Id. 271, and *Chi. & Rock Isl. R. Co.* v. *McKean*, 40 Id. 218. Where a parent allowed a child of four years of age to go unattended on the street, *Chicago* v. *Magor*, 18 Id. 349; and where defendants allowed dry grass to accumulate upon their right of way, *Ill. Cent. R. Co.* v. *Nunn*, 51 Id. 78; *S. P., O. & M. R. Co.* v. *Shawfelt*, 47 Id. 497; see *Pfau* v. *Reynolds*, 53 Id. 212. It *seems* to have been held negligence in law to run a train of cars at a high rate of speed through the street of a village: *Chi. & Alton R. Co.* v. *Gregory*, 58 Id. 226. The practice in Illinois of assigning for error the refusal of the court below to grant a new trial, obliges the Court of Appeal to discuss questions of both law and fact and renders it difficult in these cases to distinguish between evidence upon which the *jury* would be allowed to find negligence, and negligence *per se*: see *Chi. & Alton R. Co.* v. *Quaintance*, 57 Id. 389.

Tennessee.—Where the defendants, owners of a steam paper-mill, left two cogwheels running, about two feet above the ground, and twenty feet from a street, without any cover, guard or enclosure whatever, and with no one in charge of them, notwithstanding the fact that children were in the habit of playing about every day, and the plaintiff, a child three years of age, was caught in the wheels and crushed, it was *held*, that the court ought to have instructed the jury, as a matter of law, to find for the plaintiffs: *Whirely* v. *Whiteman*, 1 Head. 610.

Wisconsin.—Negligence is a conclusion of fact to be drawn by the jury, under the instruction of the court. But where there is an entire absence of proof of negligence, or where the plaintiff's own proof shows negligence on his part, a nonsuit is properly ordered: *Laughoff* v. *Milw. & P. du C. R. Co.*, 19 Wisc. 497, where, upon appeal from a nonsuit, it was held that the jury should have been allowed to decide whether a woman was negligent in trying to cross before two trains which were unlawfully racing through the main street of a town. In *Spencer* v. *Same*, 17 Id. 487, the plaintiff had his arm outside the car window and was injured; *held*, that he was not negligent in law for so doing. In *Rothe* v. *Milw. & St. P. R. Co.*, 21 Id. 256, where the plaintiff came down the steps of a mill upon a railroad track, with two bags of grain on his shoulder and was run over, and at the trial was nonsuited, there seems to have been no negligence on the part of defendants. The act of the defendants' servants in making a "running switch" in the populous part of a town, with no person in charge on the front end of the loose cars, was held negligence in law: *Butler* v. *Same*, 28 Id. 487. *Kellogg* v. *Chicago & N. W. R. Co.*, 26 Id. 229, followed the Illinois cases, *supra*, in holding it not negligence *per se*, to allow dry grass to accumulate on the way of a railroad. See also *Detroit & Milw. R. Co.* v. *Curtis*, 23 Id. 152.

United States.—*Sioux City & P. R. Co.* v. *Stout*, is a very recent case, 17 Wall. 637, Hunt, J., there says: "It is true that where the facts are undisputed the effect of them is for the judgment of the court and not for the decision of the jury. This is true in that class of cases where the existence of such facts comes in question, rather than where inferences or deductions are to be made from the facts. * * * In some cases too the necessary inference from the proof is so certain that it may be ruled as a question of law. If a sane man voluntarily throws himself in contact with a passing train, there being nothing to counteract the effect of this action, it may be ruled as a matter of law that the injury to him resulted from his own fault. * * So if a coach driver intentionally drives within a few inches of a precipice, and

an accident happens, negligence may be ruled as a question of law. On the other hand if he had placed a suitable distance between his coach and the precipice, but by the breaking of a new iron axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may presume to be clearly established from which one sensible, impartial man would infer that negligence existed; another man equally sensible and equally impartial would infer that there was no negligence. It is this class of cases, and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer, these sit together, consult, apply their separate experience of the affairs of life to the facts found, and draw an unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge. * * * We find, though not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed, it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence."

England.—It was said by Lord Brougham in *Tobin* v. *Morrison*, Moore P. C. 126, that "The matter of law and the matter of fact must be kept separate; without the severance of the two neighboring provinces of judge and jury, the trial by jury cannot in any intelligible and consistent sense be said to exist * * yet in the present instance, the action being for negligence, the special verdict finds facts and leaves the court to say whether negligence has or not been proved. Negligence is a question of fact, not of law, and should have been disposed of by the jury." The numerous discussions in the English courts on the subject of negligence, all seem to arise upon the question whether there was any evidence of negligence to go to the jury. See for example, *Smith* v. *London & S. W. Ry. Co.*, L. R. 5 C. P. 98, where upon a verdict for plaintiff with leave to enter a motion for nonsuit, if the court should be of opinion that there was no evidence of negligence which ought to have been submitted to the jury, the court complains that "great difficulty is thrown upon the judges, who are called upon to determine questions of this sort, which make them too much judges of facts." In all cases the English courts seem to adhere strictly to the maxim, *Ad quæstionem facti non respondent judices, ad quæstionem legis non respondent juratores:* Broom Leg. Max. 102. In *Patterson* v. *Wallace*, 1 McQueen H. of L. Ca., there was no controversy about the facts, but only a question whether certain facts proved established negligence. The judge at the trial withdrew the case from the jury, but it was held to be a pure question of fact for the jury and the judgment was reversed.

This summary of the decisions in America and England, shows that in most cases the question of negligence is one to be submitted to the jury, upon the question of reasonable care under all the circumstances of the case.

Evidence of gross acts of carelessness, and entire disregard of safety has, however, in some of the states been held to withdraw cases from the province of the jury. These are usually upon the part of the plaintiff. The policy of this rule may be doubted; it is not too much to say that it ought not to be extended beyond narrow limits. If the evidence of negligence is such as shocks the mind of the court, it is not likely that twelve reasonable men will find ordinary care on the plaintiff's part, and all such questions, it is thought, can safely be left to them. To confuse the province of the court with that of the jury will result, it is feared, in introducing uncertainty into the law, and in a consequent increase of litigations; as can be readily shown by the number of cases in the books in which an appeal has been taken for the refusal of the court to decide upon negligence as a matter of law where the jury has found that there was no negligence, or in which the court has held the measure of duty too strongly against a party, and withdrawn the case from the jury.

In cases where the law has imposed a plain duty upon a person, other than the usual one of ordinary, reasonable care under all the circumstances of the case, cases might, more properly, be withdrawn from the jury upon undisputed facts. These, it is suggested, are usually cases in which the duty is one arising out of some public relationship to other persons, as that of railroad companies to passengers, where the measure of duty is not ordinary care, but something much more definite and specific, and capable of exact legal definition. There the court defines the duty, and the jury have only to find compliance or not. If the measure of duty is simply a proper regard for one's own safety, or one's own property, there can be no standard but ordinary care. The best tribunal to decide that question, whether the facts are disputed or not, is the jury.

The words of one of the judges and sages of the law, may often be called to mind with profit: "It is of the greatest consequence to the law of England, and to the subject, that the powers of the judge and jury be kept distinct; that the judge determine the law, and the jury the fact; and if ever they come to be confounded, it will prove the confusion and the destruction of the law of England:" Lord HARDWICKE, in *Rex* v. *Poole*, Cases temp. Hard. 28.

F. R.

Supreme Court of Pennsylvania.

APPEAL OF BELLE D. FOSTER.

Where partners purchase real estate with the money of the firm as partnership property, upon the settlement of the partnership business brought about by the death of one of the members of the firm, the proceeds of the sale of the interest of the deceased partner in such real estate is to be regarded as land remaining in specie, after discharging its liabilities as partnership stock; and the widow of such deceased partner is entitled to an interest therein for her life only.

JOHN FOSTER died in August 1871, intestate. He left surviving him a widow, the appellant Belle D. Foster, who administered upon his estate, and five children. At the time of his death, and prior thereto, said John Foster and Samuel M. Kier were

partners in the business of mining and selling coal. The firm owned considerable real estate, the conveyances to them being in some instances as partners, and in others as tenants in common; but all the purchases were made with partnership funds and for partnership purposes, and the real estate was so held and used by the firm at the time of Foster's death. At the dissolution of the firm in consequence of the death of Foster, the partnership was largely indebted, but upon an appraisement of all the property of the firm, made by the surviving partner, it was found that after deducting the partnership liabilities, and the individual liabilities of Foster to the firm, the net interest of the latter was worth $25,508.30; and an application was made to the Orphans' Court by his widow, as administratrix, and the guardian of his minor children, for leave to sell and convey his interest in the firm, lands and personalty, to the surviving partner, Samuel M. Kier, for said appraised value, in accordance with the provisions of the Act of April 18th 1853. The court decreed a sale as prayed for, and further decreed that the widow should receive the interest of one-third of the purchase-money during her life, and that the residue should go to the children of the deceedent. From this latter part of the decree, which restricted the right of the widow to the interest merely of one-third of the principal during her life instead of adjudging it to her absolutely, she took this appeal.

M. W. Acheson, for the appellant.

Thomas Ewing, for the appellee.

The opinion of the court was delivered by

SHARSWOOD, J.—The question raised upon this record may be thus concisely stated: When real estate has been held as partnership stock—the firm dissolved by the death of one of the members—a settlement and balance ascertained to be due by the surviving partner to the estate of the deceased, is such balance as far as derived from the sale of the realty to be distributed as real or personal estate? The appellant, who is the widow of John Foster, deceased, who was a copartner of Samuel M. Kier in the firm of Kier & Foster, claims that she is entitled to one-third of the interest of the said Foster, as ascertained by the settlement, absolutely as personal estate; the decree of the court below awards it to

her for life only as realty. The firm property at the time of Foster's death was composed both of lands and movables. They were engaged in the mining and selling of coal. The appellant, as administratrix, and William W. Young, as guardian of the minor children of John Foster, presented a petition to the Orphans' Court of Allegheny county, setting forth "that at the time of his death, the said John Foster was an equal partner with Samuel M. Kier in the firm of Kier & Foster, engaged in the mining and selling of coal, the property of the said firm being situated in the county of Allegheny; that while in many instances the real estate belonging to the said firm was conveyed to them as tenants in common, yet the same was really held by and purchased with the money of the firm as partnership property; that the said firm of Kier & Foster were largely indebted; that Kier, the surviving partner, had proposed to purchase the interest of Foster for the sum of $25,508.30, he, the said Kier, assuming all the debts and liabilities of the firm; that it would be greatly to the advantage of all interested that the interest of Foster should be sold at private instead of public sale, and the proposition of Kier accepted; that they unite in the petition for the purpose of removing any question which may arise from the fact that several of the said properties have been conveyed to the said John Foster and Samuel M. Kier as tenants in common, and not expressly as partners." Upon this petition the Orphans' Court decreed a private sale to Samuel M. Kier for the sum named, and that the proceeds of sale be treated and considered as the proceeds of real estate, and accordingly distributing and applying the purchase-money between the widow and heirs of decedent. It is from this latter part of the decree that this appeal is taken.

It has not been and cannot be denied, upon the appraisement and settlement of the partnership debts and assets which accompanies the petition, that after discharging all the liabilities of the firm, the interest of Foster in the lands and real estate which formed the most considerable portion of the stock was fairly represented by the sum agreed to be paid for his entire interest. It is the well-settled rule in marshalling the assets of a decedent, that the personal property is to be first applied in the payment of debts. The general principle is that the personal estate is the proper fund for that purpose, and shall be first applied even to the payment of debts with which the real estate is charged: *Keyzey's Case*, 9

S. & R. 71; *Walker's Estate*, 3 Rawle 237; *Cadbury* v. *Duval;* 10 Barr 273. This is indeed the unbending rule of our statute law, for no order can be made by the Orphans' Court authorizing an executor or administrator to make sale of real estate for the payment of debts unless it shall appear that the personal assets are insufficient for the purpose: Act of February 24th 1834, sec. 20, Pamph. L. 80; Act of March 29th 1832, sec 31, Pamph. L. 198. It is true, that it may often happen that where personal property is used in connection with a colliery or manufacturing establishment, it is very much for the interest of all parties that it should be sold together. That is a difficulty which seems inherent in the subject—equally applicable to the property of any decedent—not peculiar to one whose property is an interest in partnership stock. It seems to be considered as well settled, that where land is a part of partnership stock, it at no time—not even during the continuance of the partnership—becomes personalty in such an unqualified sense as to give one partner an implied power to dispose of the whole partnership interest in it. As regards the power of disposition, land held as partnership stock is not subject to the rule which makes each partner the agent of the firm. Neither can sell more than his own undivided interest, unless he have from the other a sufficient special authority for the purpose. This seems to be the inevitable result of the Statute of Frauds, both as to legal and equitable interests or estates: *Murphy* v. *Hubert*, 7 Barr 423; *Anderson* v. *Tompkins*, 1 Brock. 457; *Tapley* v. *Butterfield*, 1 Metc. 515. It follows, that the surviving partner could not sell the real estate in conjunction with the personalty. When such a difficulty presents itself, it must be met either by a separate sale of the personalty, or in the mode resorted to in this case. Here we have practically no difficulty growing out of the necessary intermixture of realty and personalty.

For all the purposes of the question before us, this case must therefore be considered the same as if after dissolution by the death of one partner, and payment of all partnership debts, and any balance due the surviving partner, there had remained in *specie*, unconverted, land, the interest of the deceased partner in which is ascertained to be worth $25,508.30. Is the land thus remaining unconverted and in *specie* to be regarded, for the purposes of distribution under the intestate laws, as real or personal?

This is an entirely new question in this state. It was supposed

to arise in *Meily et al.* v. *Wood*, 21 P. F. Smith 488, but this court thought otherwise, and distinctly declined to express any opinion upon it. A careful examination of all our determinations has failed to discover either decision or even *dictum* bearing upon the point. Even *Abbott's Appeal*, 14 Wright 234, which has been pressed upon us as an authority, is inapplicable. In that case, although the balance of a fund in court arising from the sale of partnership real estate on an execution against the firm, was awarded to the surviving partners as against the claim of one of them in his own right, and as the executor of a deceased partner, to aliquot shares; yet as stated in the decree, these surviving partners were "settling the business of the firm," and it is said in the opinion by Mr. Justice READ, that "the business of the firm, dissolved by the death of George Abbott, has never been finally settled, and it is alleged by the appellees that the firm is still largely indebted." We approach the determination of the question, therefore, untrammelled by any authority. Nor will it be necessary to pass in review the fluctuating and discordant opinions in England and our sister states. We are saved this labor by the learned and exhaustive opinion of Chancellor WALWORTH, in *Buchan* v. *Sumner*, 2 Barb. Ch. 165. We are at entire liberty to resolve this important and interesting problem on principle and reason.

Conversion is altogether a doctrine of equity. In law it has no being. It is admitted only for the accomplishment of equitable results. It may be termed an equitable fiction, and the legal maxim *in fictione juris semper subsistit equitas*, has redoubled force in application to it. It follows of necessity, that it is limited to its end. Lord ELDON advanced this idea while his mind was evidently laboring and in suspense on the general subject. In *Ripley* v. *Waterworth*, 7 Ves. 425, he said: "There is an obvious difference from all the cases, which establish this general principle, that where a person dealing upon his own property only, has directed a conversion for a particular special purpose, or out and out, but the produce to be applied to a particular purpose, when the purpose fails, the intention fails; and this court regards him as not having directed the conversion." There must be some purpose recognised as lawful to be accomplished by a conversion before equity will permit it to have place. Surely it will not be pretended that a man could by a mere declaration of record convert his land into

personalty, so as to defeat the lien of mortgages, judgments and other encumbrances, elude the provisions of the Statute of Frauds, and change the course of distribution in case of intestacy. If, however, a trust is created, either by deed or will, with an absolute direction to sell and distribute the proceeds either among creditors or others, equity considers that as actually done which has been directed to be done, in order to accomplish the lawful intent of the grantor or testator. If it continued land, subject as such to sale, mortgage and encumbrance by the eventual distributees—the present *cestuis que trust*—the result aimed at might be defeated, and the intention frustrated. So where land is, by the agreement of the partners, made partnership stock, it is an out-and-out conversion only because otherwise the objects of the partnership would be defeated, if the sale, mortgage or encumbrance of his separate interest by one partner could prevent the equity of the other partners to have the partnership property applied to the payment of the partnership debts, and the balances which might be due to them respectively. When the purpose of conversion is attained, conversion ends, or more accurately, reconversion takes place. Thus when the sale under the trust is made, the character of personalty does not follow the land into the hands of the purchaser. The proceeds are personalty and are distributed as such among the *cestuis que trust*, because that was the very object of the conversion. So with land in partnership when sold by the firm, the land becomes land again in the hands of the purchaser, and the proceeds personalty, but personalty to what extent? Only to the extent of accomplishing the purposes of the conversion, namely, the equity of the partners to have the joint debts and their own advances paid before any part goes to the other partners or their separate creditors.

In *Dyer* v. *Cornell*, 4 Barr 359, where by order of the Orphans' Court the land of minors was sold for their maintenance and education, it was held that the proceeds, supposing them to retain the character of land, lose that and become personalty on the first transmission, though to an infant. The administrator of the minor was decided to be entitled to the money as money. The court, indeed, were of opinion that the sale *ipso facto* worked a transmutation, but they added, by COULTER, J., "But even admitting that the money in this case bore the impress of real estate, and the inheritable qualities peculiar to lands and houses, in analogy to the case of *Lloyd* v. *Hart*, 2 Barr 473, for how many generations or descents

shall it wear that complexion? It must cease as it mingles with other moneys of the distributee, otherwise uncertainty, confusion and litigation will indelibly mark its character. This court is of opinion that it cannot be carried further than the first descent, in any case." The same question is pertinent in regard to the land in the present case. If land, remaining in *specie* after the partnership is dissolved and wound up, and all the purposes of its conversion answered, is still personal estate, how long is it to remain so? Certainly all the forms of the law as to realty must be observed in its transmission from hand to hand, and shall it not be subject to the lien of judgments in the lifetime, and debts upon the decease of its owner? If not, uncertainty, confusion and litigation will indelibly mark its character. But it may be asked, when is the precise moment of its reconversion? The answer is, the moment the partnership is wound up, either by decree, judgment or agreement, and it is determined that it no longer forms a part of the partnership stock, and is not required for its purposes. In *Burr* v. *Sim*, 1 Whart. 252, where land was ordered to be converted by will, and the proceeds to be paid to a legatee, it was held that the election by the legatee before any sale, to take the land as land, operated as a new acquisition. It was a purchase of it as land by a surrender of the right which he undoubtedly had to consider it as money. Where, then, a partnership is dissolved, wound up, and completely ended, what can it be but an election of the land as land, and the reconversion of it?

It must be remarked, also, that without the order of the Orphans' Court in this case, the legal title of John Foster to an undivided moiety of the lands could not have been conveyed to Samuel M. Kier. We have seen that this is a well-settled point. If it were not so, the appellant as administratrix might have assigned it. She joined in the application to the court with the guardian. The decree for the private sale was under the provision of the Act of April 18th 1853, sec. 4, Pamph. L. 505; and the fifth section of that act has declared that in all cases of sale according to its provisions, "The purchase-money * * * shall in all respects be substituted for the real estate sold * * as regards the enjoyment and ownership thereof, after the payment of liens, and shall be held for or applied to the use and benefit of the same persons, and for the same estate and interest * * * as the real estate sold had been held." Under the express provision of the

statute, the proceeds of the real estate sold under this order must be considered as of the same character as the land remaining in *specie* after discharging its liabilities as partnership stock. On the whole, then, we are of the opinion that the appellant was only entitled to an interest for her life, and that the decree of the court below was right.

Decree affirmed, and appeal dismissed at the cost of the appellant.

The question presented in the foregoing case, as was said by the learned judge who delivered the opinion, is an entirely new question in Pennsylvania, while the decisions in England and the American sister states are fluctuating and discordant.

I. In England, it was formerly held that the real estate of a partnership should be treated as partnership effects, and subject to the rules regulating the distribution of personal property: *Jeffereys* v. *Small*, 1 Vernon 217; *Lake* v. *Craddock*, 3 P. Wms. 158; Gow on Part. 50–288. The only departure was in regard to the claims of the widow and heirs of a deceased partner, as in *Thornton* v. *Dixon*, 3 Brown's Ch. Cas. 199; and even in cases of this kind, Lord Thurlow recognised the general principle, as he did also in *Lyster* v. *Dollard*, 1 Vesey, Jr. 435, and Sir William Grant held the same views in *Bell* v. *Phyn*, 7 Vesey 453, and *Balmain* v. *Shore*, 9 Vesey 500. But even this exception was subsequently withdrawn, and it is now finally settled in England that real estate of a partnership is to be considered and treated as personal property as regards all persons, whether partners, creditors, heirs or personal representatives, and that on the death of a partner, his interest in such real estate goes to his personal representatives, unless there is something in the partnership articles to give it a different direction: see Montague on Partnership, App. 97–164; *Selkrigg* v. *Davies*, 2 Dow's Parl. Cases 231; *Phillips* v. *Phillips*, 1 Myl. & Keene 649; *Broom* v. *Broom*, 3 Id. 443; *Houghton* v. *Houghton*, 11 Sim. 491; *Morris* v. *Kearsley*, 2 Younge & Coll. 139; *Darby* v. *Darby*, 3 Drewry 495; *Ripley* v. *Waterworth*, 7 Vesey 425; *Essex* v. *Essex*, 20 Beav. 442; Collyer on Part., § 148; Bissex on Part. 55; Lindley on Part. 566.

And the rule was recognised in Ireland: *In re Thomas Ryan*, 3 Irish Equity Rep. (New Series 1868–9) at page 232. But where partners after the termination of the partnership, continued to treat the real property which had been purchased by the firm, as real estate, as was shown by their renting it to a new firm, Lord Langdale later held, that upon the death of one of the members of the old firm, his beneficial interest in such real estate was in equity to be treated as real estate, and that it went to the heir at law: *Rowley* v. *Adams*, 7 Beav. 548; and see also *Randall* v. *Randall*, 7 Sim. 271. A good reason for this ruling might be deduced from the fact that the real estate in that case was not required for the payment of partnership debts, but was the surplus of the partnership which had not creditors between whom and the partners there were any equities to subserve; or that the partners had tacitly agreed to consider the surplus real estate as an investment, or had elected to take and hold such real estate as land, as was done by the legatee in *Burr* v. *Sim*, 1 Wharton 252 (referred to in the foregoing opinion), who elected to take as real estate, the land ordered to be converted by will and its proceeds paid to the legatee. And even real estate of a firm expressly declared in the deed to be

considered as personal estate, was in a later case held to support in the several members of the firm an equitable freehold sufficient to entitle them to vote as freeholders; a stretch of judicial construction in the interest of electoral privileges, which added electors as another class of persons to be noticed when considering the subject: *Baxter* v. *Newman*, 1 Lutw. Regist. Cases 287. But Chief Justice TINDALL, in delivering the opinion of the court in that case, distinctly recognised the general rule that a court of equity treats real property as if it were personal estate, in order to carry out the intention of the partners.

II. In the United States the decisions have fluctuated, although it is not difficult to determine from them that the weight of the authority establishes the rule that the real estate of a partnership, bought with partnership funds, for partnership purposes, is in equity to be treated as partnership effects, chargeable with the debts of the firm and with any balance which may be due from one partner to another. It has been so held in Maine in the case of *Smith* v. *Jones*, 3 Fairfield 337; and Chief Justice WESTON doubted whether this was not to be controlled by statute: *Blake* v. *Nalter*, 1 Appleton 19. And the general principle was affirmed in *Buffum* v. *Buffum*, 49 Maine 108.

It was held in Massachusetts, where two persons were partners and real estate was purchased with the funds of the partnership and then one partner died, that his administrators could not apply for an order for the *sale* of the property, but that the surviving partner only could apply for such an order: *Shearer* v. *Paine*, 12 Allen 289. A prior case (*Goodwin* v. *Richardson*, 11 Mass. 469), which was in conflict with the general rule, was said by Mr. Justice STORY in the Circuit Court of the United States, in the case of *Hoxie* v. *Carr*, 1 Sumn. 104, to have turned upon a mere point of local law, under a local statute, and did not dispose of the equities of the partners arising from general principles.

The case of *Sigourney* v. *Munn*, 7 Conn. 11, went so far in support of the general principle, as to hold that the rules of law which govern the transmission of personal property, apply to real estate when bought with partnership funds. *Coles* v. *Coles*, 15 Johns. 159, on looking at the syllabus seems in conflict with the general principle, but on examination it will be found to have been a dispute, not over the equities of the partners and partnership creditors, but of the partners themselves in relation to the *surplus* proceeds of sale of real estate in an action for money had and received. In *Smith* v. *Jackson*, 2 Edw. Chanc. 28, real estate of a firm was treated as partnership assets; and so far has the general rule been recognised and established in New York, that it has since been held that the surviving partner has a right to make a *contract* of sale of partnership real estate to pay partnership debts, and compel the heir of his deceased partner, although he be a minor, to join in the deed of conveyance of the legal title: *Delmonico* v. *Guillame*, 2 Sand. Chanc. 266. The same principle was acted upon in *Andrew's Heirs* v. *Brown*, 21 Alabama 437. *Dyer* v. *Clark*, 5 Mete. 562.

In New Jersey, in a case where real estate which had been purchased by a partnership was retained by partners and treated as real estate for a long time after the dissolution of the firm, and each partner had separately sold his undivided half of the land, and the rights of the creditors were not concerned, it was decided that the proceeds of the sale must be considered as proceeds of real estate held by the partner as tenant in common: *Smith* v. *Wood*, Saxton 74. And in a subsequent case the same court recognised and acted upon the principle

that real estate purchased by a firm, although the deed be made to one member of it, is in equity the property of the partnership. *Baldwin* v. *Johnson*, Id. 441.

In Pennsylvania, where a partnership took a lease in fee and erected buildings out of partnership funds, and some years after the dissolution of the firm and the premises had ceased to be used for partnership purposes, one of the partners mortgaged his third to a *bonâ fide* mortgagee, who had no notice of the equities of the other partners, the Supreme Court held that as between the mortgagee and partnership creditors, the mortgaged premises were to be considered as real estate, and that the mortgagee was entitled to priority of payment out of the proceeds of the undivided third mortgaged to him: *McDermott* v. *Lawrence*, 7 S. & R. 448. This case was decided upon the question of notice, and to affect purchasers with notice, the same court subsequently held that the intention of partners to bring real estate into partnership stock should be manifested by writing duly recorded: *Hale* v. *Henrie*, 2 Watts 144.

In California, the mortgagee of the undivided interest of one of three partners in real estate of the firm, was denied a decree of foreclosure and sale under his mortgage after there had been a sale of the whole property to pay partnership debts, thus recognising and acting upon the general rule that such property was partnership assets, and not individual property: *Jones* v. *Parsons*, 25 Cal. 100.

In Virginia, the Court of Appeals, while recognising the general rule, held, however, that a *bonâ fide* mortgagee of the interest of an individual partner was to be protected and allowed a priority: *Forde* v. *Herron*, 4 Munf. 316. And in *Pierce* v. *Trigg*, 10 Leigh 406, the court said in regard to land purchased with partnership funds: "It ought, as between the executor and heir, to replace the fund withdrawn from the personal estate. By placing it as stock in the partnership, the deceased evinced a design to treat it as personalty, and it ought to go accordingly. The representatives of the deceased can claim it only as stock, and as stock in trade, it is, *ex vi termini*, personal." And see also *Deloney* v. *Hutcheson*, 2 Rand. 183, *Edgar* v. *Donnelly*, 2 Munf. 387.

In North Carolina, partition of land held by a partnership was denied until the accounts of the partnership were taken, and the interest of each partner ascertained: *Baird* v. *Baird*, 1 Dev. & Bat. Eq. 524. And in South Carolina, the widow of a copartner who had died largely indebted to the firm was denied dower in his legal estate in the real property of the firm: *Richardson* v. *Wyatt*, 2 Dess. Eq. 471. And in *Winslow* v. *Chiffelle*, Harper's Eq. 25, real estate of a firm was held chargeable with the debts of the firm in preference to the separate debts of each member. And it has since been held that real estate of a partnership will be treated and administered for partnership purposes as if it were personal property: *Boyce* v. *Cooter*, 4 Stroh. Eq. Cas. 30.

The Court of Errors and Appeals in Tennessee, decided that the real property of a firm on the death of one partner devolved upon the other for the purpose of paying the debts of the firm; and the surplus proceeds of such real estate went to the heir of the deceased partner: *McAllister* v. *Montgomery*, 3 Hay. 94. And that where the title was taken in the name of one partner, proof that partnership funds were used in the purchase is *primâ facie* evidence that it was intended to be held as partnership property: *Hunt* v. *Benson*, 2 Humph. 459; and see *Yeatman* v. *Anderson*, 6 Yerger 20.

In Ohio the widow of a partner who had died largely indebted to the firm, was denied dower in the real estate of the firm, although the legal title was in all the partners as tenants in common:

Greene v. *The Surviving Partners of Greene & Co.*, 1 Hamm. 535. The subsequent case of *Greene* v. *Graham*, 5 Hamm. 264, does not conflict with the general principle, as it simply held that in the absence of proof that one half of the property did not belong to the deceased partner, the grantee of his representative was entitled to partition.

In Louisiana it has been held where one partner took title to real property for the benefit of the whole firm in payment of a debt, and where the property did not enter into and become part of the partnership stock, that such real property is held subject to the usual rules for the conveyance of real estate, and that the partner taking the title cannot alienate to the prejudice of his partners, and that if he does, the other partners and the heirs of such as may be deceased, may recover their undivided interests in such property from a purchaser who took the same under circumstances which made it his duty to make inquiries which would have led to notice: *Richardson* v. *Packwood*, 1 Martin (N. S.) 290.

And the general principle was recognised in *Pugh* v. *Currie*, 5 Ala. (N. S.) 446; *Woolridge* v. *Wilkin*, 3 Howard (Miss.) 360; *Thayer* v. *Lane*, Walker's Chancery 200; *Galbraith* v. *Gedge*, 16 B. Monroe 631; *Loubat* v. *Nource*, 5 Florida 350-63; *Kramer* v. *Arthurs*, 7 Barr 165; *Overholt's Appeal*, 2 Jones 222; *Lancaster Bank* v. *Myley*, 1 Harris 544; *Meason* v. *Kaine*, 13 P. F. Smith (Pa.) 335.

In Maryland the real estate of a partnership is as between the partners and their creditors, treated as personal property. But when all the claims against the firm are adjusted, in the absence of a special agreement, if the estate is solvent, a widow will be entitled to dower in the proceeds of the sale of such real estate, coming to her husband's estate: *Goodburn* v. *Stevens*, 5 Gill. 27; *Goodburn & Wife* v. *Stevens*, 1 Maryland Ch. 420.

And from the foregoing cases may be deduced the other rule that the surplus proceeds of sale of the real estate of a partnership, after the creditors are satisfied, and the equities of the partners adjusted, are to be considered as realty, and that on the death of a partner his interest in such surplus goes to his heir subject to the widow's dower, and not to his personal representative: *Buchan* v. *Sumner*, 2 Barb. Ch. 165; *Shearer* v. *Shearer*, 98 Mass. 107; Parsons on Part. 383.

M. Arnold.

United States District Court—Northern District of Illinois.

MATTER OF P. K. CHANDLER, Bankrupt.

A speculative option to deliver goods within a certain time at a specified price, where the object of the parties is not a sale and delivery of the goods, but a settlement in money on differences—commonly called a "put,"—is a wagering contract and void, either as within the statutes against gambling or as against public policy.

The bankrupts, Peyton R. Chandler, and the firm of Chandler, Pomeroy & Co., were engaged in buying and selling grain on the Chicago market, and as members of the Board of Trade of that city. In May 1872, Peyton R. Chandler conceived the idea of

making a corner in oats for the month of June then ensuing, and with that view he purchased all the "cash oats" as they arrived in the market, and took all the "options" offered him for June delivery—his purpose being to own all the oats in the market, and compel those who had sold "options" for June to pay his price; or, in other words, to settle with him by paying such differences as should exist between the prices at which he purchased the options and the price he should establish for cash oats on the last day of June, when his options matured. In pursuance of this plan, he purchased, between the 15th of May and the 18th of June, 2,500,000 bushels of cash oats, being all, or substantially all, the cash oats on the market, and also bought June "options" to the amount of 2,939,400 bushels. The total amount of oats in store in Chicago on the 18th of June was only 2,700,000 bushels, and the total amount received during the remainder of the month was only 800,000 bushels. As incidental to and part of the machinery of this corner, Chandler also sold what are called "puts," or privileges of delivering to him oats during the month of June for 41 cents a bushel. These "put" contracts read as follows:—

"Received of E. F. $50, in consideration of which we give him, or the holder of this contract, the privilege of delivering to us or not, prior to 3 o'clock P. M. of June 30th 1872, by notification or delivery, 10,000 bushels No. 2 oats, regular receipts, at 41 cents per bushel, in store, and, if delivered, we agree to receive and pay for the same at the above price.

Chicago, June —, 1872. CHANDLER, POMEROY & Co.
R. P. CHANDLER."

The amount paid by the purchaser of these "puts" was ½ cent per bushel for whatever quantity was named in the contracts. The total quantity of oats called for by these "puts" amounted to about 3,700,000 bushels.

When Chandler commenced to buy oats with a view to the corner, the price in the Chicago market was about 39 cents a bushel. After he took possession of the market he put the price to 41 cents and upwards, and held it there until the 18th of June. In the meantime the price had declined in New York and other markets, so that oats to ship were not worth over 33 to 35 cents, and July options for this market were not worth over 36 cents. On the 18th of June P. R. Chandler and Chandler, Pomeroy & Co.

failed, and the price declined before the close of business that day from 41 to 30 cents, and continued to decline during the remainder of the month, so that at one time they were as low as 26 cents per bushel.

Between the time of the failure and 3 o'clock on the 30th of June, the holders of the "puts" claim to have made tender to the bankrupts of the quantity of oats called for by their respective tickets, and the oats not being accepted and paid for, they sold them upon the market that day or the next, under the rules of the Board of Trade, and proved their claims for the differences between the price named in the "put" and that for which they sold.

The total amount of claims thus proved was about $400,000, and the total amount received by the bankrupts for these puts was less than $19,000. The assignee of Chandler moved to expunge the claims of this kind from the list of debts proved.

BLODGETT, J.—The proof shows conclusively that the plans of Chandler and the fact that he was manipulating the market with express reference to a corner in oats for June, were well known and understood on the Board of Trade, while the number of these "put" claims, about 125, all, or substantially all, in favor of members of the board, show that the struggle between Chandler, who was endeavoring to hold up prices, and the sellers of "options" and holders of "puts" who were endeavoring to break the price, was quite generally participated in by members of the board. In other words, it was notorious that Chandler was endeavoring to keep the price at 41 cents or upwards, while the sellers of "options" and holders of "puts" were endeavoring to break down the price. It is true that in this testimony some of the claimants say there was no "corner," or that they did not know that there was a corner, but the cross-examination shows that they knew Chandler was trying to make a corner, and they say he did not do it because he failed before the end of the month, so that by their own admission, they knew what he was attempting, knew the reasons for his purchase of such large quantities of "cash oats," and options, and knew he did not sustain his corner because the "short" interest broke him down, and the moment a man bought a "put," he became identified with the short interest—his interests were antagonistic to Chandler.

The assignee attacks these claims upon the ground that they

are fraudulent as against the other creditors of the bankrupt. The main ground, and the only one which I shall consider, being that they are wager-contracts, and therefore void. Without taking time to discuss all the points raised by the able arguments which have been adduced, and the various reasons urged for and against these claims, it is enough to say that it seems to me that the contracts in question partake of all the characteristics of a wager. It is in substance an assertion by the seller of the "put" that oats cannot be purchased on that market before 3 o'clock P. M. of the 30th of June for less than 41 cents a bushel, and an undertaking to pay the difference between 41 cents and any market price. If he, Chandler, sustains the price at 41 cents or above, he wins the half-cent a bushel paid for the "put," because the holder will not deliver, while if the price goes below that named he is to pay the difference. This is practically the contract.

It is as manifestly a bet upon the future price of the grain in question, as any which could be made upon the speed of a horse or the turn of a card. The evidence in this case shows that in nearly all the cases of settlements on "put" or "option" contracts, the grain is never delivered nor expected to be delivered, but the parties simply pay the difference, as settled by the prices. But, if that were not so in all cases, it is clear that in this case no delivery of the grain was intended by these "put" holders, because they knew that Chandler controlled all the oats in the market and fixed the price, and that their only expectation for success depended on their being able to break the market before their time for delivery expired. Some of them say—Bensley, I think—that they intended to deliver the oats, but it is absurd to suppose that they intended to deliver, unless they could do so for less than forty-one cents. They intended to deliver if they could break Chandler, or prevent his "corner" from culminating, as the jockey may *intend* to walk his own horse over the course after he has poisoned or lamed that of his competitor. They did not intend to deliver, if Chandler succeeded. Thus a struggle inevitably ensued between Chandler and the holders of this immense amount of "puts" and "options," Chandler alone on one side attempting to hold up the price, and all the rest seeking to put it down. The fact that the sellers of "options" and holders of "puts" were able to get resolutions through the Board of Trade, making new warehouses, where oats had never been stored before, "*regular*" for the per-

formance of these contracts, shows the intensity of the contest and the overwhelming influences with which Chandler had to contend. I do not mean to be understood as saying that the fact that Chandler sold "puts" to so many as to create an overwhelming opposition, makes the transaction any more or less a wager than if he had only sold one "put," but it shows the notoriety of the whole proceedings.

From the very nature of the transaction the interest of the holder of the "put" is to break down the price and that of the seller to maintain it. The number engaged in this transaction, and the quantities involved, demonstrate that neither party expected any grain to be delivered. Chandler expected to hold up the price, in which event no grain would be offered him, and the other parties must have known they could not get the grain to deliver unless they first broke Chandler, as he held all the grain, and then, although they might tender, he could not receive, so that in payment no actual delivery was anticipated. They made their tenders only as a method of establishing differences after he had failed, and was powerless.

That transactions of this kind are only wagers is abundantly established by authorities: *Grizewood* v. *Blain*, 11 Com. Bench 538; *Brua's Appeal*, 55 Penn. St. 298; *Kirkpatrick* v. *Bonsall*, manuscript opinion of Sup. Ct. Pa,; *Ex parte Manham*, 2 De G., F.& J., 634; *Cussard* v. *Hinman*, 1 Bosworth 207. It is true those cases arose under statutes making such transactions void as gaming contracts. But the test applied was: Did the parties intend to sell on one side and buy on the other the stocks which purported to be the subject-matter of the transaction, or did they only intend to adjust the differences? And as it was found that they only meant differences when they said shares, the contracts were held to be essentially gambling contracts, and therefore void.

It is said, however, that there is no statute in this state expressly prohibiting contracts of this kind, as there is in England and Pennsylvania; and, as the Supreme Court of this state has decided that wagers are not necessarily void, therefore, these contracts—not being inhibited by any express law of this state—are not void. There is no dispute that contracts of wager are valid at common law, unless affected with some special cause of invalidity: *Ball* v. *Gilbert*, 12 Met. 397. But wagers which are contrary to public policy have always been held by the courts to be essentially

void, without statutory prohibition, and cannot be made the ground of an action: *Hartley v. Rice*, 10 East 22. And a high authority in the profession has stated the law on the subject of the validity of wagers with great force and clearness, when he says:

"As the moral sense of the present day regards all gaming or wagering contracts as inconsistent with the interests of the community, and at variance with the laws of morality, the exception necessarily becomes the rule:" 2 Smith Lead. Cases 306.

Indeed, any one rising from a full examination of the law applicable to wagers, as expounded by the courts, would undoubtedly testify that while he has found in the books, and especially among the older text-writers and cases, general expressions to the effect that wagers were valid at common law, he has found the cases, where they have been enforced, to be extremely rare, and the courts have been astute to find reasons for not enforcing them.

Following this general current of authority, the Supreme Court of this state, under the statute prohibiting gaming, has decided that the wagers upon horse-races are void, and cannot be enforced; and that money paid on such wagers can be recovered back: 23 Ill. 493; 51 Ill. 473. The language of the Illinois statute on which these decisions are based, is, in substance, that all promises made, &c., where the consideration or any part thereof shall be money won by gaming, &c., *shall be void.*

The language of 8 and 9 Vict., on which *Grizewood* v. *Blain* and other English cases were decided, is: "All contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void." The precise question made in this case has never been before the Supreme Court of this state to my knowledge, and I am not aware that it has ever been raised at the Circuit, except in a late case before his Honor Judge TREE, of this city, when he held that "option contracts for grain, when the parties intended only to pay the differences and not to deliver grain, were void, as wagering contracts." I quote him as reported in the daily papers of this city. But it hardly seems possible that any court called upon to construe the Illinois statute in the light of the expositions already made by our courts and of the English decisions upon a statute so substantially similar, could hesitate to pronounce these contracts wagers, and void as contrary to the statute.

But even if not within the letter or spirit of the statute of this

state, the common-law authorities quoted, show that all wagers contrary to the public policy are void without reference to any statute. And, as the contracts under consideration are essentially nothing but bets upon the price of oats in this market within the time limited, and as it is obvious that the effect of such transactions is to beget wild speculations, to derange prices, to make prices artificially high or low, as the interests, strength and skill of the manipulators shall dictate, thereby tending to destroy healthy business and unsettle legitimate commerce, there can be no doubt of the injurious tendency of such contracts, and that they should be held void as against public policy. As is most cogently said by the learned judge who delivered the opinion in the case cited from 55 Penna. :—

"Anything which induces men to risk their money or property without any other hope of return than to get for nothing any given amount from another, is *gambling*, and demoralizes the community, no matter by what name it may be called."

The financial disaster and ruin which followed "Black Friday" in New York, and the scarcely less damaging local consequences which followed the various "corners" which have either succeeded or been attempted in this city, furnish conclusive proof, if proof were needed, that such gambling operations should be held void, as contrary to public policy.

The total amount paid by the claimants in these cases was less than $19,000, and yet the amount they claim is within a fraction of $400,000—a disparity between the consideration paid and the sum demanded which strikes the mind at once as so grossly inequitable that the judicial conscience is shocked, and revolts from being made the instrument for enforcing such outrageous injustice.

I do not intend to be understood as holding that every option contract for the delivery of grain or stock, or that every "put," is necessarily void, but only that all these contracts, in the light of the testimony before the court, were in their essential features gambling contracts. The parties when they made them did not intend to deliver the grain, but only at the utmost to settle the differences. They knew they could not obtain the grain to deliver if Chandler sustained his "corner," and their action in buying a "put" was virtually a bet on their part that he could not accomplish what they all knew he was endeavoring to do, that is, keep up the price through June to his own figures, and virtually a bet on his part that he could do so.

It is shown in the proof, and urged in the argument, that the "put" is in itself a very harmless contract—that dealers frequently resort to them as a method of insuring prices. It is answer enough to this to say that the proof fails to show that such was the object of any of these claimants. Chandler was taking all the cash oats offered at the price named in the "puts" and upward, and none, with the exception of Bensley, claim that they had any oats to fill the "puts," at the time they bought, or bought for that purpose till after Chandler's failure. It is perhaps possible to imagine a dealer with a stock of grain on hand which he wishes to hold for an advance, who may take a privilege of this kind to insure himself against a decline while waiting for an advance. But the very act of offering to sell a "put" either implies that the seller has control of the market so that he expects to make his own price, or else it is a mere reckless assertion of the seller's opinion that the price will be maintained, either of which partakes of the character of a bet.

"A wager," says Bouvier, "is a contract by which two or more parties agree that a sum of money or other thing shall be paid or delivered to one of them on the happening or not happening of an uncertain event."

To say that these contracts were taken for the purpose of insurance is too far-fetched an excuse, and evidently an afterthought.

In what I have said I do not intend to vindicate Chandler. His conduct was as reprehensible as that of the claimants. All were engaged in an immoral and illegal transaction, and this court ought not to allow its powers to be prostituted to the enforcement of these contracts for either party. Money lost at play or in gaming cannot be recovered except where an action is given by statute, but, as I have already intimated my opinion that these cases are within the statute of this state on the subject of gaming under which money paid may be recovered back, I shall allow the claimants to prove their claims for the amounts actually paid by them respectively, which is a half-cent per bushel on the grain named on their tickets.

The foregoing case, for which we are indebted to the Chicago Legal News, seems to us one of great importance, just now in particular, and we are glad to lend our aid in making it more generally known to the profession and the people, as far as in our power.

We do not purpose going into much discussion upon the legal questions involved in the opinion. They are there fully

discussed and the leading authorities referred to. We can entertain no question of the entire soundness of the decision. We know that wagers at common law were held valid, unless in some way against public policy, either in the subject-matter or the contemplated mode of consummation. This exception, as stated in the opinion, has, from time to time, been so enlarged as to become the general rule, both in England and America. Some of the states have expressly decided that all wagers are illegal. *Collamer* v. *Day*, 2 Vt. 144, and other similar cases might be referred to. Stockjobbing, or dealing in differences, has now become the chief business of the stock exchange, in our country, if we exclude speculations in gold, which are conducted in the same manner, and can only be cured by restoring the currency to the specie basis; this demoralizing and degrading species of wagering or gambling, is no doubt, generally reprobated by the lovers of morality and decency throughout the country; but we do not seem to approach even toward its extinction. The English Statute 7 Geo. 2, c. 8, made perpetual by 10 Geo. 2, c. 8, is directed exclusively against such dealing in the public stocks of the country. These statutes make all contracts for the sale of public stocks to be delivered at a future day, when the seller had no such stocks at the date of the contract and none were ever intended to be transferred under it, but only the payment of differences, illegal and void; railway shares were held not within the statute: *Hewett* v. *Price*, 4 M. & G. 355; *Fisher* v. *Price*, 11 Beavan 194. But this statute was not intended to affect *bonâ fide* sales of public stocks, Lord ABINGER, C. B., in *Mortimer* v. *McCullom*, 6 M. & W. 69. But in a later case, *Grizewood* v. *Blain*, 11 C. B. 538, it was held that a sale of railway shares to be delivered in future, where only differences were expected to be paid, was gaming, within 8 & 9 Vict. c. 109, § 18. And we think it is generally considered in this country that all mere speculations in differences upon the stock exchange is gaming, and as such illegal. And it requires little wisdom or comprehension to see that similar contracts in the staple products of the country are none the less corrupting and immoral. We do not, of course, know what effect it will be likely to produce, when all such speculating contracts are condemned by the courts, as a species of gaming. The love of gaming, in some form, is deeply rooted in civilization; and Christianity seems not essentially to lessen its force or prevalence. But it is something to know, and feel, that the thing is illegal and immoral in whatever form disguised.

I. F. R.

Supreme Court of Missouri.

DEGIVERVILLE ET AL. *v.* DEJARNETTE ET AL.

The late war between the United States and the Confederate States, was a public war in such sense that all the people of one section were public enemies of the people of the other section.

An alien enemy, though he may not sue, may be sued and his property within reach of process subjected to execution during the war.

The right of a mortgagee under a power in the mortgage to sell the mortgaged premises in case of default, is not impaired or suspended by the war, on account of the voluntary residence of the mortgagor in the hostile section.

Notice required under a power of sale in a mortgage is not for the benefit of the mortgagor in the sense of notice to him. It is only to secure his right to a fair sale of the property.

ERROR to St. Louis Circuit Court.

The petition set out a purchase by the plaintiffs from the defendants in the year 1857 of certain real estate in the city of St. Louis, and the giving of notes for the consideration, secured by deed of trust, payable in one, two, three and four years, the last becoming payable on the 30th of April 1861; a failure to pay the last note and a sale by the trustee in consequence, on the 9th of June 1861, after publication of notice as required by the deed of trust. It was alleged that all the notes were paid except that which matured on the 30th of April 1861, and that the plaintiffs were ready and willing to pay this also, but were prevented by a state of war, existing at that time, between the United States of America, of which Missouri was a part, and the Confederate States, of which Virginia was a part; and that the plaintiffs were in 1857, and in 1861, and during the whole of the war which followed, citizens and residents of the county of Caroline, Va. By reason of the war existing it was alleged that the notice and sale under the deed of trust were fraudulent and void. It was averred that as soon as peace was restored, the plaintiffs tendered to the purchaser of the land the amount due under the deed of trust, which was refused, and they prayed that the deed made by the trustees under the sale of June 9th 1861, be set aside and annulled. To this petition the defendants demurred, assigning for causes of demurrer that the petition showed no cause of action; that it appeared that at the time the default was made there was no suspension of intercourse between the citizens of Virginia and those of Missouri, and that even when the sale was made under the deed of trust, there was no such suspension, and that there was no excuse for the non-payment of the note of the plaintiffs. The court below overruled the demurrer and gave judgment for the plaintiffs.

The opinion of the court was delivered by

WAGNER, C. J.—Whether there was any real or actual suspension of the relations theretofore existing prior to the Act of Congress of July 12th 1861, empowering the President to prohibit, by proclamation, all commercial intercourse between the rebellious and

the loyal states, and the proclamation of the President in pursuance thereof, issued August 16th 1861, I will not stop to inquire. The case has been argued here upon the theory that at the time the sale took place, Virginia had passed her ordinance of secession, and was out of the Union, and was among the number waging war against the general government. If so, her citizens were entitled to belligerent rights, and were clothed with all the characteristics of alien enemies.

Since the decisions in the Supreme Court of the United States in the cases of *The Venice*, 2 Wall. 258; *Mrs. Alexander's Cotton*, 2 Wall. 404; *Manson* v. *Insurance Company*, 6 Wall. 1; *The Ouachita Cotton*, 6 Wall. 521; *Hunger* v. *Abbott*, 6 Wall. 532; *Coppell* v. *Hall*, 7 Wall. 542; *McKee* v. *United States*, 8 Wall. 163; and the *United States* v. *Grossmayer*, 9 Wall. 72, the question must be regarded as settled, that the late war between the Confederate States and the United States was a public war, and a war, not only between the respective governments, but between all the inhabitants of the one territory on the one side and all the inhabitants of the other territory on the other side, so that all the people of each occupied the respective positions of enemies during the continuance of the war.

The consequence of a state of war is the interruption and interdiction of all commercial intercourse, correspondence and dealing between the subjects of the hostile countries. Kent says the interdiction flows necessarily from the principle that a state of war puts all the members of the two nations respectively in hostility to each other, and to suffer individuals to carry on a friendly and commercial intercourse while the two governments were at war would be placing the act of government and the acts of individuals in contradiction to each other: 1 Kent Com. 66.

As a corollary of this doctrine the principle is well established that an alien enemy cannot sue a friendly citizen in the courts of the latter's country: Bac. Abr. *Alien* D; *Aleinous* v. *Nigren*, 4 El. & Bl. 217; *De Wahl* v. *Braune*, 1 H. & N. 178; *Whelan* v. *Cook*, 29 Md. 1; *U. S.* v. 1756 *Shares of Stock*, 5 Blatch. 231. His disability is temporary in its nature, and personal, and founded upon reason and policy, and in a great measure upon necessity. But no such reason or policy forbids judicial proceedings against an alien enemy in favor of a friendly citizen, and the rule is there-

fore settled that while an alien enemy may not sue, he may be sued at law.

The question has frequently been brought up in our courts in regard to matters arising out of the late rebellion, and adjudications in the courts of last resort have all been in accordance with the principles above announced.

In *Mixer et al.* v. *Sibley*, 53 Ill. 61, it was decided that when a party residing in the state of Illinois holding a promissory note against a person residing in one of the states in rebellion, in the year 1862, after the Act of Congress and the President's proclamation prohibiting commercial intercourse between the adhering states and those in rebellion, commenced a suit thereon by attachment, which was levied on real estate situated in that state belonging to the maker, and obtained a judgment and procured a sale to be made of the premises attached, that the court had jurisdiction of the cause, and the judgment and proceedings thereunder were valid and binding, notwithstanding the defendant resided in one of the rebellious states, and the war at the time was in active progress.

In the case of *Dorsey* v. *Kyle et al.*, 30 Md. 512, the court holds that a person who, by his own voluntary act, assumed the attitude of an alien enemy to his state and to the government of the United States, going from Maryland to Virginia during the late civil war, allying himself with the Southern cause and joining the Confederate army, cannot claim exemption from process of attachment in behalf of antecedent creditors, against his property remaining in the state, on the ground that he was an alien enemy, and that all legal remedies were suspended during the period of hostilities. It is emphatically declared that neither reason nor policy forbids judicial proceedings against an alien enemy in favor of a friendly citizen, and therefore while an alien enemy may not sue he may be sued at law. The same question again arose in *Dorsey* v. *Dorsey*, Id. 522, and the same principle was again asserted and reaffirmed.

The same conclusion was arrived at in the case of *Thomas v. Mahone*, in the Court of Appeals of Kentucky (12 Am. Law Reg., N. S. 433). There the Civil Code of Kentucky authorized the creditors of a citizen who departed from the county of his residence and remained absent thirty days within the Confederate lines, to attach his property and sell the same for the payment of their debts. The

plaintiff left his home and joined the Confederate service, and while so absent attachments were procured and his property sold, and the court held that the fact that the debtor was a soldier in the Confederate army would not deprive the court of jurisdiction under the Code. LINDSAY, J., in delivering the opinion of the court, pointedly remarks: "It does not follow because appellant was at the time a soldier in the army of the belligerent power, and that all unlicensed communication with him by the people of the states adhering to the Federal Union was inhibited, not only by the laws of war but by express statute, that resident creditors might not sue him in the courts of this state and subject to the judgment of their debts such of his property as might be found within the local jurisdiction of the courts in which he was sued. The right of resident creditors so to proceed against parties indebted to them residing within the lines of the hostile power and held to be public enemies by reason of their participation in the Southern movement, was recognised by the Federal Congress in the Act of March 3d 1863 (2 Bright. Dig. 1238), providing for the seizure and confiscation of the property of such persons."

In *Crutcher* v. *Hind and wife*, 4 Bush 363, the same court held that a proceeding by a Kentucky creditor to enforce his lien on land situated in that state was not interdicted, notwithstanding the existence of the war and the residence of the debtors within the Confederate lines. The Supreme Court of the United States in the case of *McVeigh* v. *The United States*, 11 Wall. 259, after citing *Albritche* v. *Leissmann*, 2 Ves. and Bea. 324, Bacon's Abridgment and Story's Equity Pl. § 53, for authority, say: "Whatever may be the extent of the disability of an alien enemy to sue in the courts of the hostile country, it is clear that he is liable to be sued."

It is contended that the case of *Dean* v. *Nelson*, 10 Wall. 158, asserts a contrary doctrine. That case was a proceeding within an insurrectionary district, but held by the national military forces, in a court established by military orders alone. It was a proceeding to foreclose a mortgage on personal property, and it was instituted against parties who had been expelled by military force from their residence and who were forbidden absolutely by the order which expelled them from coming back again within the lines of the military authority which organized the court. They were not voluntarily within the Confederate lines, but were sent there against their will, and inasmuch as without their consent and against their

will, they were thus driven from their homes and forbidden to return by the arbitrary act of the military power, it was held that a judicial decree by which their property was sold during the continuance in force of this order was void as to them.

But in the subsequent case of *Ludlow* v. *Ramsey*, 11 Wall. 581, it was adjudged that the doctrine of *Dean* v. *Nelson* that a judicial proceeding on a mortgage carried on within the Union lines against a person driven by way of retaliation for outrages committed by others outside of those lines, and prohibited from returning within them, did not apply to a person who went and remained voluntarily in rebellion. Such a person could not complain of legal proceedings regularly prosecuted against him as an absentee.

But there is another aspect in which this case must be considered, and which is really the principal point, and upon which I would have been satisfied to have placed it had not the counsel for the defendants in error, plaintiffs in the court below, insisted in their briefs that the war produced an entire suspension of all proceedings whatever between the citizens of the respective sides, and avoided all judicial process. The sale was made under a deed of trust, containing an agreement that in default of payment when the notes matured, the trustee, upon giving the requisite notice, should proceed to sell the property to satisfy the debt. It contained a power coupled with an interest which was irrevocable in its character, and when the contingency arose calling forth its execution, the trustee was authorized to execute it regardless of the status of the grantors at the particular time. So as far as the authority of the trustee was concerned to go on and make a sale of the property in satisfaction of the debt, it made no difference whether the grantors were in the Confederate lines or in the jungles of India, or even if they were dead. It may be conceded that they were in a place or in a condition where it was physically impossible for notice to reach them, but that would not alter the case, as the notice was not designed to be given for their benefit in the sense of notice to them. It was intended to notify the community that the sale would take place in order that bidders might be present to purchase the property.

In the case of *Beatie* v. *Butler*, 21 Mo. 213, it appears that Beatie borrowed a certain sum of money, and, to secure its payment, he executed a mortgage on real estate containing a power of sale. Before the note was paid off Beatie died, and after his death

the mortgagee sold the property. Neither the widow nor children of Beatie were notified of the sale. Afterwards they moved to set aside the sale, but the court denied the motion, holding that the death of the mortgagor did not extinguish or suspend the power of sale in the mortgage. SCOTT, J., in writing the opinion of the court, says: "The argument that the death of Beatie should have suspended all proceedings under the mortgage, in analogy to the suspension of all process of execution under the administration law against the estate of defendants, cannot be maintained. The law may suspend its own process. As it gives the process, it may regulate it. But deeds of trust and mortgages, with a power of sale, arise from the consent and agreement of parties, and there is no propriety in depriving creditors of the fruits of their foresight and caution. The statute of the 25th of January 1847 is an answer to the argument. That statute, notwithstanding the death of the grantor in a deed of trust, recognises a right of sale in the trustee, though it is postponed for nine months after the death of the maker of the deed."

The precise question now under consideration arose in *Harper et al.* v. *Ely et al.*, 56 Ill. 179, where the court decided that the remedy of the holder of a mortgage in that state to make sale of the mortgaged premises in case of default, under a power in the mortgage, was in no wise impaired or suspended during the existence of hostilities in the late war of the rebellion on account of the residence of the mortgagor and his grantee subsequent to the mortgage within the rebellious states; and that the rule applied as well to the grantee of the mortgage, who always resided within one of the states which, after conveyance to him, joined in the rebellion, as to the mortgagor himself, who, after making the mortgage, left his residence in one of the loyal states for the purpose of engaging in hostilities against the government.

The very recent decision of the Supreme Court of the United States in *Washington University* v. *Finch et al.*, reported in the Central Law Journal No. 6, 1874, is in point. In that case the facts are that Daly and Chambers purchased of W. G. Eliot in March 1860, certain real estate in the city of St. Louis, and gave a deed of trust to secure the purchase-money. In this deed Ranlett was trustee. The purchasers were citizens and residents of Virginia. Ranlett, as trustee, advertised and sold the premises in December 1862, after the establishment of non-intercourse between

the government and the Confederate States. The United States Circuit Court declared the sale to be unlawful because of the non-intercourse, and set aside the deed made by the trustee. The Supreme Court unanimously reversed the judgment, and directed the Circuit Court to dismiss the bill. Mr. Justice MILLER, who wrote the opinion, in commenting upon *Dean* v. *Nelson*, *supra*, said that the court had "never decided nor intentionally given expression to the idea that the property of citizens of the rebel states, located in the loyal states, was, by the mere existence of the war exempt from judicial process for debts due to citizens in the loyal states contracted before the war." Upon the merits of the immediate case under consideration, the learned judge remarked: "The debt was due and unpaid. The obligation which the trustee had assumed on a condition had become absolute by the presence of that condition. If the complainants had been dead, the sale would not have been void, for that reason, if made after the nine months, which a statute of Missouri suspends the right to sell in such cases. If they had been in Japan, it would have been no legal reason for delay. The power under which the sale was made was irrevocable. The creditors had both a legal and a moral right to have the power, made for its benefit, executed. The enforced absence of the complainants, if it be conceded that it was enforced, does not, in our judgment, afford a sufficient reason for arresting his agent and the agent of the creditor in performing a duty which both of them imposed on him before the war began. * * * The interest of the complainants in the land might have been liable to confiscation by the government; yet we are told that this right of the creditor could not be enforced, nor the power of the trustee lawfully exercised. No authority in this country or any other is shown us for this proposition. It rests upon inference from the general doctrine of absolute non-intercourse between citizens of states which are in a state of public war with each other, but no case has been cited of this kind even in such a war.

It is said that the power to sell in the deed of trust required a notice of the sale in a newspaper; that this notice was intended to apprise the complainants of the time and place of sale, and that, as it was impossible for such notice to reach the complainants, no sale could be made. If this reasoning were sound, the grantors in such a deed need only go to a place where the newspapers could not reach them to delay the sale indefinitely or defeat it

altogether. But the notice is not for the benefit of the grantor in the sense of notice to him. It is only for his benefit by granting notoriety and publicity of the time, terms and place of sale, and of the property to be sold, that bidders may be invited, competition encouraged and a fair price obtained for the property. As to the grantor, he is presumed to know that he is in default and his property liable to sale at any time, and no notice to him is required. * * * We are of the opinion that the sale of the trustee in the case under consideration was a lawful and valid sale, and that complainants' bill should have been dismissed."

This argument, it seems to me, is unanswerable, and is so remarkably clear and satisfactory that nothing remains to be added. The judgment is reversed and the petition dismissed.

NAPTON and ADAMS, JJ., dissented.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

COURT OF CHANCERY OF NEW JERSEY.[2]

ASSUMPSIT. See *Vendor and Purchaser.*

Waiver of Fraud and Action on Implied Contract.—Where a person has unlawfully procured and sold securities belonging to another, the principal and interest of which is capable of being ascertained by computation, the owner from whom they have been taken, may waive the fraud in the conversion of the bonds, and claim as on an implied contract: *Allen* v. *United States*, 17 Wall.

CIVIL RIGHTS.

Colored Persons in Railroad Cars.—An Act of Congress passed in 1863, which gave certain privileges which it asked to a railroad corporation, enacted also that "no person shall be excluded from the cars on account of color." *Held,* that this meant that persons of color should travel in the same cars that white ones did, and along with them in such cars: *Railroad Company* v. *Brown*, 17 Wall.

COLORED PEOPLE. See *Civil Rights.*

COMMON CARRIER.

Negligence.—Cannot stipulate for exemption from responsibility for the negligence of himself or his servants: *Railroad Co.* v. *Lockwood*, 17 Wall.

The rule applies to the case of a drover, travelling on a stock train to look after his cattle, and having a free pass for that purpose: *Id.*

[1] From J. W. Wallace, Esq., Reporter; to appear in vol. 17 of his Reports.

[2] From C. E. Green, Esq., Reporter; to appear in vol. 9 of his Reports.

CONFEDERATE STATES. See *Rebellion.*

CONFLICT OF LAWS. See *Interest.*

CONSTITUTIONAL LAW. See *Municipal Corporation.*

CONTRACT.

Offer—May be rescinded before Acceptance unless there is Agreement to contrary.—An offer to sell at a fixed price, whether accompanied with an agency to sell to others or not, may be revoked at any time prior to the acceptance of the offer, unless there is an express agreement on good consideration to accept within a limited time, or when other acts are done which the person making the offer consents to be bound by: *Stitt* v. *Huidekopers*, 17 Wall.

An offer to take $40,000 in cash is not accepted so as to bind the party by a contract which leaves the buyer at liberty to withdraw by forfeiting a deposit of $10,000 or pay the remainder within sixty days: *Id.*

Interpretation of—Not to be governed by what either party to the contract understood or believed, unless such understanding or belief was induced by the conduct or declarations of the other party: *Bank* v. *Kennedy*, and *Bailey* v. *Railroad Company*, 17 Wall.

CORPORATION. See *Debtor and Creditor; Highway.*

CURTESY. See *Equitable Conversion.*

DEBTOR AND CREDITOR. See *Frauds, Statute of.*

Stock and Unpaid Subscriptions—Creditors have right to require Payment of—Set off.—Capital stock or shares of a corporation—especially the unpaid subscriptions to such stock or shares—constitute a trust fund for the benefit of the general creditors of the corporation, and this trust cannot be defeated by a simulated payment of the stock subscription, nor by any device short of an actual payment in good faith: *Sawyer* v. *Hoag, Assignee*, 17 Wall.

A stockholder indebted to an insolvent corporation for unpaid shares, cannot set-off against this trust fund for creditors a debt due him by the corporation. The fund arising from such unpaid shares must be equally divided among all the creditors: *Id.*

Equity will not aid Creditor to reach Debtor's Property without special Grounds for its Interposition—Equity will not exercise its jurisdiction to reach the property of a debtor applicable to the payment of his debts, unless the debt be clear and undisputed, and there exist some special circumstances requiring the interposition of the court to obtain possession of, and apply the property: *Board of Public Works* v. *Columbia College*, 17 Wall.

Evidence of Fraud.—Evidence of it not required to be more direct and positive than facts and circumstances tending to the inference of it: *Rea* v. *Missouri*, 17 Wall.

Where a creditor of B. levied on certain goods as B.'s, for which C. interposed a claim of ownership, *Held*, That an intimate personal and business relation between B. and C. having been shown, it was

error to instruct the jury that it was immaterial as to the ownership of the goods how C. acquired his means, or whether his exhibit of them was correct or not: *Id.*

Equitable Conversion.

Naked Power of Sale in Executors—Until Actual Sale Land remains Realty with Title in the Heirs, and Husband of one of them is entitled to curtesy.—Where a naked power of sale is vested in executors with no absolute direction to convert, but wholly discretionary not only as to the time of sale but as to whether the sale shall ever be made, the land remains land until the sale actually takes place: *Romaine* v. *Hendrickson's Executors*, 9 C. E. Green.

Until the sale, where the land is not devised to the executors, the title is in the heirs, and the husband of a daughter of the testator, dying after her father and before the sale is entitled to curtesy in her share of the land: *Id.*

Such tenant by curtesy and the son of such deceased daughter to whom her said share of the land descended subject to the curtesy, are proper parties to a bill against the executors to set aside a sale of testator's lands on the ground of fraud, and for a discovery and account: *Id.*

Under a naked power of sale where the land is not devised to the executors, but till the sale the title is in the heirs, a sale to a pretended purchaser but really to themslves is not a conversion of the lands, and does not affect the rights of the heirs: *Id.*

Equity. See *Debtor and Creditor; Fraud; Trust.*

Damages for taking of lands—If a change in the amount of damage done to lands takes place after report of Commissioners equity will relieve.—Under an award by commissioners appointed to appraise and estimate the value of lands about to be taken for a railroad, and assess the damages the presumption of law is that damages were awarded to the owner for all injuries that might result to him. For injuries not considered by the commissioners, no adequate remedy can be had at law: *Carpenter* v. *Easton & Amboy Railroad Co.*, 9 C. E. Green.

Where, at the time of making an award for damages for land taken by a railroad company, the representatives of the company stated to the commissioners that they would cross certain low land by an iron bridge resting upon posts, and would protect and keep clear a lane, the only convenient means of communication between different parts of a farm, but subsequently the company determined to construct a high embankment, and have commenced it, and intend to fill in and cut off the lane entirely,—it clearly appearing that the commissioners did not consider the embankment in the estimate of damages,—equity will restrain the company from filling up the lane, until compensation is made to the owner of the lands: *Id.*

The Court of Chancery has power to determine in such case, the amount of compensation: *Id.*

The original commissioners were appointed to estimate and report a proper compensation: *Id.*

Estoppel. See *Municipal Corporation.*

Fixtures.

Tests as to what constitutes.—Whether property ordinarily treated as

personal goes with the realty as fixtures or otherwise, is not determined by its capability or incapability of being detached and removed from the premises without injury to the freehold, but depends upon the particular circumstances of the case: *Quimby* v. *Manhattan Cloth and Paper Company*, 9 C. E. Green.

As between mortgagor and mortgagee, when the fixture appertains to the real estate, is necessary for its enjoyment, and is permanently attached to the freehold, it will be treated as realty: *Id.*

The permanency of the fixture depends upon the motives and intentions of the party attaching it. If attached for temporary use with the intention of removing, the mortgagor may remove it; *Aliter*, if attached for the permanent improvement of the freehold: *Id.*

That fixtures were called personal property in the deed to the mortgagor for the premises, and a bill of sale therefor accompanied the deed, cannot affect their character as between mortgagee and mortgagor: *Id.*

The three requisites for determining the character of a fixture as realty or otherwise are 1. Actual annexation to the realty or something appurtenant thereto. 2. Application to the use or purpose to which that part of the realty with which it is connected is appropriated. 3. The intention of the party making the annexation, to make a permanent accession to the freehold: *Id.*

FORMER ACTION. See *Judgment.*

Effect when not strictly Res Adjudicata.—Although a former suit about the same subject-matter as a later one may not operate strictly as *res judicata*, yet it may well be referred to when it was heard on the scene of the transaction complained of, and when it relates to a transaction forty years old, as an element by which a conclusion at a later day in accordance with its result may be assisted: *Hume* v. *Beale's Executrix*, 17 Wall.

Judgment without Personal Service not Evidence outside of State authorizing it.—A personal judgment, rendered in one state against several parties jointly, upon service of process on some of them, or their voluntary appearance, and upon publication against the others, is not evidence outside of the state where rendered of any personal liability to the plaintiff of the parties proceeded against by publication: *Board of Public Works* v. *Columbia College*, 17 Wall.

FRAUD. See *Debtor and Creditor.*

Setting aside Judicial Proceedings for—Laches.—Where a bill is filed by a third party, to set aside, as fraudulent, completed judicial proceedings, regular on their face—the bill being filed five years after the judicial proceedings which it is sought to set aside have been completed—the cause of so considerable a delay should be specifically set out. And if ignorance of the fraud is relied on to excuse the delay, it should be shown specifically when knowledge of the fraud was first obtained: *Harwood* v. *Railroad Co.*, 17 Wall.

FRAUDS, STATUTE OF.

Fraudulent Conveyance.—Under the Statute of Frauds of Missouri, a sale of household furniture in a house occupied jointly by vendor and

vendee, both using the furniture alike, and there being no other change of possession than that, the vendor after going around with the vendee, and looking at the furniture and agreeing on the price, turned it over to the vendee, and executed a bill of sale before a notary, both parties then, after the sale, occupied the house and used the the furniture exactly as before, is void as against the vendor's creditors: *Allen* v. *Massey*, 17 Wall.

Highway.

Interference by Railroad company—Right of Township authorities to invoke aid from Courts.—Township authorities have a special interest in the highways, beyond that of the public at large, and may properly file a bill, in their corporate name, to restrain a threatened destruction of a highway within its limits: *Township of Greenwich* v. *The Easton & Amboy R. R. Co.*, 9 C. E. Green.

A grant of power, in laying out and constructing a railroad, to change the location of any public road, if the company shall find it necessary, and to occupy such portions of the road as they may deem necessary or expedient;—the company in such case, to cause the changed portion of such public road, to be reconstructed at their own expense, in as perfect a manner as the original road, does not authorize the diversion of an ancient highway, because the company find it to their pecuniary advantage or convenience to make such diversion. The diversion must be necessary: *Id.*

A grant of new and extraordinary power to a private corporation in contravention of the established rights of the public must be construed with a reasonable strictness: *Id.*

Husband and Wife. See *Equitable Conversion.*

Infant. See *Master and Servant.*

Contributory Fault no Bar.—Need not himself have been free from fault to entitle him to recover damages resulting from the fault of another: *Railroad Co.* v. *Stout*, 17 Wall.

Interest.

Lex fori.—Where allowed, not under contract, but by way of damages, the rate must be according to the *lex fori*: *Goddard* v. *Foster*, 17 Wall.

Judgment. See *Former Action.*

Is Merger of Cause of Action.—Judgment on a note or contract operates as a merger of it, and when the judgment is binding personally, it can be introduced in evidence and relied on as a bar to a second suit on the note: *Eldred* v. *Bank*, 17 Wall.

Laches. See *Fraud; Trust.*

Mandamus.

To Public Officers—Not valid against Successor in Office.—Against an officer of the government, in the absence of statutory provision to the contrary, abates on his death or retirement from office. His successor in office cannot be brought in by way of amendment of the proceeding, or on an order for the substitution of parties: *United States* v. *Boutwell*, 17 Wall.

Master and Servant.

Fellow Servant—Infant of tender years not within the Ordinary rule.—The rule that the master is not liable to one of his servants for injuries resulting from the carelessness of another, when both are engaged in a common service, although the injured person was under the control and direction of the servant who caused the injury—whether a true rule or not—has no application when one of the persons employed and injured is a boy of tender years, employed as a helper under the superintendence of a full-grown man of mature years, and required by the master to obey his orders: *Railroad Co.* v. *Fort*, 17 Wall.

Merger. See *Judgment.*

Mortgage.

Mortgagee assigning mortgage with guarantee—Bill in equity to foreclose—Remedy at law or assignor's guarantee.—A mortgagee who assigns the mortgage, and guarantees the debt, is a proper party in a suit to foreclose the mortgage, and a personal decree may be made against him for any deficiency: *Jarman* v. *Wisevall*, 9 C. E. Green.

That the liability of such guarantor cannot take effect until the remedy against the mortgagor shall have been exhausted is no objection to the jurisdiction of this court. The decree in such case would be made to conform to the liability: *Id.*

That the guarantor is liable at law by direct and express covenant for the payment of the deficiency and his liability therefore a mere legal one, will not deter the court under the statute from exercising jurisdiction: *Id.*

Motion to amend a final decree to make it personal against a guarantor of a mortgage debt, for a deficiency refused, under the circumstances of the case, where the complainant's remedy at law was adequate: *Id.*

Municipal Corporation.

Municipal Authorities have authority to bind Property-Owners for improvements—But having made a Contract for such Improvements they are in some sense trustees for such owners, and Equity will prevent a Sacrifice of the latter's Interests—Standing by without objection is evidence of assent by the property-holders—Control of courts over Municipal action—Contracts ultra vires.—Municipal authorities in the making of street improvements authorized by law to be made at the expense of the owners of lands to be benefited thereby, are to a certain extent the agents of such owner. Contracts lawfully made at the discretion of the authorities are binding upon the landowners, though injudiciously made; but the owners are entitled to have such contracts performed substantially in all things according to their terms, and the authorities have no power to dispense with such performance to the gain of the contractor and the loss of the property-owners: *Schumm* v. *Seymour*, 9 C. E. Green.

If official authorities are about to accept and pay under a contract, for what in substantial and important respects, is not according to the contract, so that the difference enures to the benefit of the contractor at the expense of the owners, the authorities in so doing are guilty of a breach of trust which amounts to a fraud. The proper and only remedy in such case is in equity: *Id.*

If the landowners stand by and see the officials pay the contractor they can have no relief against the assessment. But a court of equity will enjoin such wrongful payments, and in so doing does not interfere with the exercise by municipal corporations of the legislative or discretionary powers conferred by their charters: *Id.*

In the exercise by municipal corporations of their legislative or discretionary powers they are beyond the control of the courts; but after such powers have been exercised, and the authorities are about to pay the contract price for street improvements with the money of the landowners, they are not acting in a legislative capacity, but in the capacity of agents amenable to the courts: *Id.*

Where a contract made by street commissioners under charter authority, requires that paving shall be done in accordance with specifications, but the work is not so done, and the departure from the contracts results in a large saving to the contractor, the payment of the stipulated price will be restrained, even though the substituted work be equally good with what the contract required: *Id.*

The affairs of a corporate body can be transacted only at a corporate meeting. Its legislative and discretionary powers can be exercised only by the coming together of the members who compose it, and its purposes or will can be expressed only by a vote embodied in some distinct and definite form. Their only existence is as a board, and they can do no valid act except as a board, and such act must be by ordinance or resolution, or something equivalent thereto: *Id.*

Under a charter investing commissioners with powers over street improvements, and expressly enacting that no work or materials for the improvement of streets shall be contracted for, unless specifications therefor and proposals for doing such specified work, or furnishing such specified materials, have been fully advertised, a property-owner cannot be assessed for any part of the cost of work and materials furnished upon the order of individual commissioners, and without any bargain as to price or other particulars between the commissioners in their lawful capacity and the contractor, and without advertisements or competitive bids: *Id.*

Public policy requires such restrictive enactments to be rigidly enforced, and the consequences resulting from the void character of the contracts they prohibit must be the same in equity as at law: *Id.*

It is a general and fundamental principle of law that all persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation or its officers to make the contract. And a contract beyond the scope of the corporate powers is void: *Id.*

When municipal officers, in the making of street improvements exercise powers not conferred by charter, they are in no sense agents or representatives of property-owners, and no liability attaches to the latter from mere inaction or silence, for improvements so made. The doctrine of equitable estoppel has no place in a case where usurped powers have been exercised by municipal officers, who in so doing were contravening public policy, as well-known as positive law: *Id.*

Where officials are acting within the terms of their delegated powers, though they may be acting carelessly, negligently, or in culpable betrayal of their trust, they are the agents of those whose property is liable to be charged, and if the latter acquiesce in or fail to interpose when

the negligent or culpable conduct of their agents is open to their view, they will not afterwards be allowed to set it up when the effect of so doing will be to subject innocent parties to the burden that would otherwise fall upon themselves: *Id.*

Control of Streets by Legislature—Grant of Franchise to lay Railroad Tracks in Street—Consent of Property-holders—Constitutional Law—Estoppel by knowledge and failure to object while work being done.—The legislature has full power to authorize the laying of railways in the streets of a city. And a company having such chartered authority, and having complied with all the conditions of their charter, are entitled to operate their railway without other impediment or restriction on the part of the city than such as they may have voluntarily submitted themselves to, or as may arise from reasonable municipal regulations: *Paterson & Passaic Horse Railroad Co.* v. *Mayor of Paterson and Others*, 9 C. E. Green.

For the purposes of consent required by the charter of a street railroad company to be obtained from property-owners along the proposed route of the railway, before it can be laid, the city corporation is to be regarded as the *owner* of an open public square dedicated to the public use for ever, whether the fee be in the corporation or not, or in whomsoever it may be: *Id.*

A grant of authority to lay and operate a railway in the streets of a city without requiring the consent of owners of property along the route is lawful. It does not conflict with that clause of the constitution requiring compensation to be first made: *Id.*

Under a charter requiring that before a railway should be constructed in the streets of a city, the consent of a majority of the property-owners along the proposed route, and of the city should be first obtained, the consent of a majority of the property-owners is not a condition precedent to the consent of the city. The consents are independent, and it is immaterial which is first obtained: *Id.*

Held, That the charge of fraud upon which the city claimed the right to withdraw its consent to laying the railway was not sustained, and that the city having a knowledge of the facts at the time of passing the ordinance giving such consent were not in a position to allege misrepresentation: *Id.*

Held, also, that the acquiescence of property-owners whose consent is necessary as a condition precedent to the exercise of the franchise granted the company, in standing by and seeing the company construct and operate the road under a claim of right, will be regarded as evidence of consent: *Id.*

National Banks.

Right of Receiver to sue in his own Name.—A receiver appointed by the comptroller of the currency under the fiftieth section of the National Banking Act, may sue for demands due the bank in his own name as receiver, or in the name of the bank: *Bank* v. *Kennedy*, 17 Wall.

In order to sue for an ordinary debt due the bank, he is not obliged to get an order of the comptroller of the currency. It is a part of his official duty to collect the assets: *Id.*

NEGLIGENCE. See *Common Carrier; Husband and Wife; Infant; Master and Servant.*

NOTICE.

Duty of Inquiry.—Where inquiry is a duty, the party bound to make inquiry is affected with all the knowledge which he would have got had he inquired: *Cordova* v. *Hood*, 17 Wall.

President's Proclamation—Publication in Newspapers.—Through newspapers not necessary to give effect to a proclamation of the President. It takes effect when signed and sealed with the seal of the United States, officially attested: *Lapeyre* v. *United States*, 17 Wall.

PARTNERSHIP.

Bill in Equity by representatives of Deceased—How Survivors are to be charged with Partnership Assets.—Where a person sues in chancery as administrator of a deceased partner, to have an account of partnership concerns, alleging in his bill that he is the sole heir of the deceased partner, the fact that he is not so does not make the bill abate for want of necessary parties: *Moore* v. *Huntington*, 17 Wall.

On a bill by the representatives of a deceased partner against surviving partners for an account, these last should not be charged with the sum which the partnership assets at the exact date of the deceased partner's death were worth, but only with such sum as by the use of reasonable care and diligence they could get for them in closing the partnership business: *Id.*

Nor be charged with the value of real estate of the partnership, the title to which is left by the decree charging them, in the heirs of the deceased partner: *Id.*

POWER. See *Equitable Conversion.*

RAILROAD. See *Common Carrier; Highway.*

REBELLION.

Investment by Trustee in Confederate Bonds—Acts of States during Civil War.—To a suit by legatees to compel an executor to account for moneys received by him from sales of property belonging to the estate of his testator, and to pay to them their distributive shares, it is no answer for the executor to show that he invested such funds in the bonds of the Confederate government by authority of a law of the state in which he was executor, and that such investment was approved by the decree of the Probate Court having settlement of the estate: *Horn* v. *Lockhart*, 17 Wall.

The acts of the several states in their individual capacities, and of their different departments of government, executive, judicial and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding: *Id.*

Judicial proceedings affecting the Rights of Parties on other side of

the Army Line during the Civil War.—Judicial proceedings during the war of the rebellion, within lines of the Federal army, by a private person on a mortgage, ending in a judgment and sale of mortgaged premises, against one who had been expelled by the military authority of the United States into the so-called Confederacy, and who had no power or right to return to his home during the rebellion, held null, and a judgment which refused to vacate them reversed: *Dean* v. *Nelson*, 10 Wallace 172, affirmed: *Lasere* v. *Roehereau*, 17 Wall.

SET-OFF. See *Debtor and Creditor.*

Liquidation of.—A claim by the United States for the proceeds of bonds unlawfully procured from it by a person insolvent, and sold, consisting of the principal and interest of the bonds, and being thus capable of ascertainment, is sufficiently liquidated, though it have never been judicially determined, to be subject of set-off: *Allen* v. *United States*, 17 Wall.

SHIPPING.

Necessaries in a Foreign Port.—Where advances are made to a captain in a foreign port, upon his request, to pay for necessary repairs or supplies to enable his vessel to prosecute her voyage, or to pay harbor dues, or for pilotage, towage, and like services rendered to the vessel, the presumption of law, in the absence of fraud or collusion, is that they are made upon the credit of the vessel as well as upon that of her owners, and the presumption can be repelled only by proof that the master was in possession of funds applicable to the expenses, or of a credit of his own or of the owners of his vessel upon which funds could be raised by the exercise of reasonable diligence, and that the possession of such funds or credit was known to the party making the advances, or could readily have been ascertained by proper inquiry: *The Emily Souder*, 17 Wall.

Liens for such advances have priority over existing mortgages to creditors at home: *Id.*

SUPREME COURT OF UNITED STATES.

Jurisdiction to review Judgments of State Courts.—The Supreme Court has jurisdiction by writ of error to review the judgment of a state court when the writ is issued to the highest court of the state in which a decision of the case could be had, even if that court be an inferior court of the state: *Miller* v. *Joseph*, 17 Wall.

Construction of State Statutes.—In the construction of the statutes of a state, and especially those affecting titles of real property, where no federal question arises, this court follows the adjudications of the highest court of the state, whatever may be the opinion of this court of its soundness: *Walker* v. *State Harbor Commissioners*, 17 Wall.

TAKING OF PRIVATE PROPERTY. See *Equity.*

TRUST.

Resulting—A resulting trust of land does not arise in favor of one of two joint purchasers, unless his part is some definite portion of the

whole, and what money he pays is paid for some aliquot part of the property, as a fourth, third, or a moiety. Nor can it arise in any case for more than the money actually paid; nor be created by advances or funds furnished after the time when the purchase is made: *Olcott* v. *Bynum*, 17 Wall.

Trustee's Sale.—A deed of trust with power of sale (a deed, therefore, in the nature of a mortgage), provided that money should be paid in three equal instalments, and that in default of payment of any one "that may grow due thereon," all the mortgaged premises might be sold and a deed of the premises made to the purchaser, and that it should be lawful for the trustee "out of the money arising from such sale to retain the principal and interest which shall then be due." . . . rendering the overplus to the mortgagor. *Held (the property being incapable of advantageous sale in parts)*, that when one instalment fell due, the trustee had a right to sell, and though there was a surplus above what was necessary to pay the instalment due, yet that the trustee might reserve the whole and apply it to the residue of the mortgage debt: *Id.*

A sale of a large and valuable property under a deed of trust in the nature of a mortgage, held under the proofs to have been properly made in a body, and for cash alone, and on the premises themselves, though they were in a remote part of Virginia: *Id.*

Bill founded on alleged Breach—Laches.—A bill by *cestui que trust* was dismissed, where all the ground of action had occurred between twenty and thirty years, and the alleged breach of trust had taken place thirty-seven years before the bill was filed, and the trustee was dead. This, although the *cestuis que trust* were women, and the trustee a lawyer, who had married their half-sister: *Hume* v. *Beale's Executrix*, 17 Wall.

VENDOR AND PURCHASER. See *Frauds, Statute of.*

Vendee taking Possession under Articles of Sale not liable for Use and Occupation.—One who enters into possession of land in virtue of an agreement that he is to be a purchaser of it, cannot be held liable for use and occupation, if the purchase be concluded: *Carpenter* v. *United States*, 17 Wall.

Vendor's Lien.—Exists as against a purchaser, having notice of the deed, in those states where such a lien prevails (as in Texas), when the deed shows on its face that the consideration is yet to be paid: *Cordova v. Hood*, 17 Wall.

Taking a note from the vendee with security, though presumptively an abandonment of the lien, not so absolutely. The presumption may be rebutted: *Id.*

The vendor's testimony, if positive, sufficient to do this: *Id.*

Part payment of such a note—the note being for the payment of all and every part of the purchase-money so long as it remains unpaid—and taking a new note payable at the same time and in the same way as the original note, and the destruction of this last, does not displace the lien: *Id.*

WAR. See *Rebellion.*

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PENNSYLVANIA.

ALLENTOWN.
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NORFOLK.
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